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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 810

M. E. SANDSBERRY, JR., D. B. BARKER, C. D. PRATT, ET AL., AND GULF, COLORADO AND SANTA FE RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in the above-entitled case on July 25, 1956.

OPINIONS BELOW

The opinion of the trial court is not reported but is printed in Appendix B hereto, *infra*, p. 72. The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, printed in Appendix B hereto,

infra, p. 64, is reported in 277 S.W. 2d 776. The opinion of the Supreme Court of Texas, printed in Appendix B hereto, *infra*, p. 31, is reported at 295 S.W. 2d 412.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on July 25, 1956. A timely motion for rehearing was denied on December 5, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the validity and application of a statute of the United States, Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 2, Eleventh, is drawn in question.

QUESTIONS PRESENTED

1. Where Congress has authorized unions to require, as a condition of employment, payment of union dues, fees and assessments, portions of which are regularly used by the unions for political, fraternal and ideological purposes not related to collective bargaining, has it not unconstitutionally invaded the political liberty, freedom of speech and freedom of conscience secured to railroad employees by the First, Fifth, and Ninth Amendments?

2. Where unions demand a contract requiring all employees, as a condition of employment, not only to pay union initiation fees, dues and assessments but also to become full union members subject to the organizations' discipline and control, is such demand not in excess of the authority granted by Congress in the Union Shop Statute, Section 2, Eleventh, of the Railway Labor Act, and therefore subject to injunction at the suit of objecting employees and their employer?

3. Where Congress delegates to a labor union, a private organization, power to impose payment of union dues, fees and assessments as a condition of employment, has it

not thereby imposed a tax for private purposes in violation of the Fifth Amendment and unlawfully delegated to a private party the sovereign power to tax?

4. Under the record in this case, does the Union Shop Statute authorize compulsory union membership, including subjection to union discipline and control, and, if so, does it deprive objecting employees of their right to work, freedom of association, political liberty, freedom of speech, freedom of conscience, and property in violation of the First, Fifth, and Ninth Amendments?

STATUTE INVOLVED

The statutory provision involved is Section 2, Eleventh, of the Railway Labor Act, 64 Stat. 1238, 45 U.S.C. § 152, Eleventh, hereinafter referred to as the Union Shop Statute. It is printed in Appendix A, *infra*, p. 29.

STATEMENT OF THE CASE

By a divided vote of 6 to 3, petitioners have been denied relief by the Supreme Court of Texas from a union shop agreement which respondent unions demanded and threatened to strike to secure under the authority of the Union Shop Statute. The question on which the court divided was whether this case is ruled by *Railway Employes' Dept., A. F. of L.* v. *Hanson*, 351 U. S. 225. The minority of the court concluded that the issues and record here are different in controlling respects from *Hanson*.

This suit was begun by fourteen employees of petitioner Santa Fe Railway. On May 5, 1953, they secured from the Hon. E. C. Nelson, Judge of the 108th District Court of Potter County, Texas, a temporary restraining order against Santa Fe and respondent unions forbidding execution of "any union shop agreement * * * the result of which * * * would be to force the defendant rail-

road companies * * * to discharge the plaintiffs * * * and other employees similarly situated * * * unless the plaintiffs * * * and other employees * * * similarly situated would agree to join one of the defendant * * * labor unions." (Tr. 315.)[1]

Two of these employees are union members, and several others once were members. The remainder have never been members. They brought this suit on behalf of some 10,000 non-union employees of Santa Fe, and an undetermined proportion of 50,000 union employees, contending that the Union Shop Statute, insofar as it authorizes bargaining agreements conditioning employment on union membership or support, deprives them of their right to work, freedom of association, freedom of speech, freedom of conscience, political liberty, and property in violation of the First, Fifth, and Ninth Amendments to the Constitution of the United States.

Santa Fe consented to the injunctive relief sought, filed a cross-action seeking injunctive relief, and was granted a temporary restraining order. The purpose of its suit was to secure relief from a strike threatened to force it into a combination with the unions to deprive employees of their constitutional rights, including their right to work and freedom of association. Mr. F. G. Gurley, President of the Santa Fe, subsequently testified that compulsory union membership "does violence to my very deep-seated conceptions of personal liberties, freedom of choice, the rights of the individual and the dignity of the individual" and he, therefore, was opposed to entering into a combination which would deprive railway employees of those rights and liberties. (S.F. 1042.)[2]

1. "Tr." refers to the Transcript which contains the pleadings, motions, orders, jury issues and responses, and judgment of the trial court.

2. "S.F." refers to the "Statement of Facts," which is the transcript of testimony in the trial court.

The case was tried on the merits before Judge Nelson and a jury. Employee petitioners testified to opposition to compulsory union membership. (S.F. 37-40, 70, 100, 139, 164, 224, 274, 301, 320, 343, 380, 431.) For instance, Mrs. Elaine Williams stated that she believed that they should not "have to belong to any organization or pay anyone [for] the privilege of working," that compulsory union membership "is against our Constitution and everything this country has been built on," that it "takes away our freedom and everything our forefathers have worked for to make this country what it is." (S.F. 75.) Mrs. Barbara Eubanks, a member of the Brotherhood of Railway Clerks, testified that she was "bitterly opposed to compulsory unionism and forcing people to become a member of a union whether they want to or not and forcing them to remain a member whether they want to or not * * *." (S.F. 100.) Mrs. Mary White, who had quit the Clerks after more than six years' membership, said that she did not "believe in anyone's being forced to belong to any organization, whether church, civic, labor, or whatever it is." She added: "I feel like we have a right to quit any organization in which we don't approve at any particular time, and I don't want to pay any assessments * * * [to support] something I disapprove of, or [a] political party, or just any sort of thing that might come up that I might not be interested in." (S.F. 164.) Mr. A. A. Yarbrough quit the Clerks when he found that they were pressing for a union shop because he has "a very strong aversion to compulsory methods of any kind." (S.F. 223.) A. V. King, a member of the Brotherhood of Firemen, wants to be as free to get out of the union as he was free to join. (S.F. 276.)

Numerous employees discharged by other railroads under union shop agreements related how the Union Shop Statute had operated to deprive them of their jobs. (S.F. 458,

946, 953, 1165, 1180, 1279, 1369, 1411, 1415.) For example, Mr. John W. O'Dowd was fired by the Missouri Pacific Railroad for his refusal to join the Clerks. He refused to join because he could not "conscientiously take * * * [the] obligation and oath" required of all members by the union. (S.F. 1190.) A Negro man, Mr. A. F. Rees, was fired by the Southern Pacific Railroad after more than 30 years' service because he would not join the Clerks. The union he refused to join was the segregated "auxiliary" (*i. e.*, the Jim Crow Local). He wanted to join the integrated "good" union. (S.F. 1376-1377.) Mr. George C. Wicks testified that after some 38 years' service he had been given notice of his discharge by the Southern Pacific because he was not a union member. He said he could not join because membership was "incompatible" with his "conscience" as "a Christian." (S.F. 1367, 1368.) A young man, Mr. Ray Carney, was fired by the Missouri-Kansas-Texas Railroad because he did not belong to the Clerks. Although he had been a member, his membership had lapsed because large medical expenses in his family had made it impossible for him to keep up his dues. (S.F. 1413.)

Another witness detailed the number of employees who had been fired by other railroads under union shop agreements. (S.F. 790-791.) This witness, Mr. Daniel P. Loomis, Chairman of the Association of Western Railways, also testified that in the course of negotiations respondents refused even to consider an arrangement to permit non-members to compensate them for bargaining services without being required to become full-fledged members. They wanted "a full union shop agreement whereby all employees would be required to join the union." (S.F. 796.) From economic witnesses the important economic facts of compulsory unionism were developed (S.F. 1431-1507, 1697-1783), and the jury subsequently found that a union shop is not necessary to respondents' continued

existence and well-being. All told, some 48 witnesses testified and 85 exhibits were received in evidence. The transcript of testimony extends to more than 2200 pages.

Numerous special issues of fact were submitted to the jury. Those issues and the responses of the jury are set forth in Appendix C, *infra*, p. 83. On the basis of the evidence and the jury's findings, the trial court ordered respondents permanently enjoined from forcing union membership as a condition of continued employment on Santa Fe's employees. It ruled that the Union Shop Statute violated the guarantees of the First, Fifth, and Ninth Amendments to the Constitution of the United States.

Respondents appealed to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, which, in November, 1954, reversed the trial court's judgment.[3] It predicated its reversal on the unions' principal argument—subsequently rejected by this Court in *Railway Employes' Dept., A. F. of L.* v. *Hanson, supra*—that the case presents no constitutional issues because it involves no governmental action.[4] It affirmed all but one of the jury's findings, and the one it rejected is of no present significance.

Petitioners secured from the Supreme Court of Texas a writ of error. Oral arguments were heard by that court, first, on May 11, 1955, but the case was not decided prior to this Court's decision, on May 21, 1956, in the *Hanson* case.

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3. The federal questions here raised were presented to the Court of Civil Appeals in appellees' (petitioners here) Second Counterpoint.

4. In note 2, page 17, of their Brief in *Hanson*, the unions concluded that if governmental action was involved "serious constitutional questions would arise." Before Emergency Board No. 98, counsel for respondents conceded that "Of course, Congress could not make * * * [the union shop] mandatory." Transcript of Proceedings of Emergency Board No. 98, Vol. 1, December 11, 1951, p. 16.

The instant case was set for reargument on June 27, 1956. On July 25, the Texas court announced the decision which petitioners now seek to have reviewed.[5] The difficulty it had with the issues is reflected in the sharp division among its members recorded in four separate opinions. A timely motion for rehearing was denied on December 5, 1956. On January 16, 1957, the court ordered its mandate stayed and the injunction continued in effect pending action by this Court on petitioners' application for writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case raises questions of constitutional law and construction of an Act of Congress of grave importance not only to the hundreds of thousands of persons whose employment is subject to the Railway Labor Act but of importance also to the public at large and to employers faced with strike threats to force them to sign compulsory union membership contracts.

Stated in summary form, certiorari should be granted herein for the following reasons:

1. The record herein contains much evidence not found in the record in *Railway Employes' Dept., A. F. of L.* v. *Hanson, supra,* regarding the political, fraternal and ideological activities of respondent unions, so that questions of general importance involving employees' political liberties, freedom of speech, and freedom of conscience—secured by the First, Fifth and Ninth Amendments—which were reserved by this Court in *Hanson,* are here presented. In deciding these questions, the Supreme Court of Texas misconstrued the import of this Court's decision in *Hanson.*

5. The federal questions here raised were presented to the Supreme Court of Texas in petitioners' Fifth, Sixth, Seventh, Eighth, and Eleventh Points of Error, and in Points III, IV, and V of petitioners' Supplemental Brief.

2. The Supreme Court of Texas has resolved an important question of federal law, that is, in application of the Union Shop Statute to the facts of this case, in a manner in conflict with this Court's *Hanson* decision. This question is of great importance to administration of the Statute.

3. Petitioners present for decision an important question regarding the constitutionality of the Union Shop Statute which was not considered in *Hanson*.

4. The record herein contains much evidence absent from *Hanson*, so that questions involving the employees' right to work, freedom of association, and property—secured by the First, Fifth and Ninth Amendments—which were reserved by this Court in *Hanson*, are here presented.

We may consider these in the order stated.

I.

Respondents Engage in a Wide Range of Political, Fraternal, and Ideological Activities Which Employee Petitioners Cannot Be Compelled to Support Under the Union Shop Statute Consistently With the First, Fifth and Ninth Amendments.

If employees are forced to make regular money payments to a union, there is no doubt but that a portion of that money will be used for political, fraternal and ideological purposes. With at least some of those purposes petitioners have disagreed in the past and will disagree in the future. Others with which they do agree they nonetheless would not willingly give their money to. They accordingly assert that to compel them to contribute money for the support of political and other causes, without reference to their personal wishes, deprives them of their political liberties, freedom of speech, and freedom of con-

science secured by the First, Fifth and Ninth Amendments. See *United Public Workers* v. *Mitchell*, 330 U. S. 75.

This record is replete with evidence of respondents' political and other activities outside the scope of collective bargaining. One employee witness had been a member of the Clerks for some five years but got out after it served its demand for a union shop because he "did not want to be associated with an organization that would force its will upon people that did not agree with it by making them a part of that organization." (S.F. 502.) He objected to the use of dues, fees and assessments for political purposes, and stated that his union had political aims and supported certain political parties. (S.F. 505.) He further testified that the secretary of the union told him that one assessment levied was for political education purposes to aid in the election of the union's candidate for President in 1948, and that "everybody is paying the assessment. You have to pay it." (S.F. 506-507.)

Another employee who had dropped his union membership testified that one of respondent's local officials demanded a contribution for Labor's League for Political Education. This official came to the witness with a receipt book and stated that he was going to give him a receipt for $2 for a payment to LLPE. The witness refused the demand because he did not want to have anything to do with the union's "propaganda." (S.F. 466-468.)

LABOR is a weekly newspaper owned by 15 unions, including seven of respondents, and is their "Official Washington Newspaper." Among its purposes is publication of the views of railroad unions regarding political candidates and political issues. It is not conducted for profit and carries no paid advertising. Subscriptions are included in the dues levied by three of respondents—Sheet Metal Workers' International Association, Brotherhood of Rail-

way Carmen of America, and Order of Railroad Telegraphers.

Seven issues of LABOR were received in evidence in this case: November 29, 1952; December 6, 1952; December 20, 1952; March 14, 1953; April 18, 1953; May 2, 1953; and May 30, 1953. Plaintiffs' Exhibits 17, 18, 19, 20, 21, 22, 23. These contain numerous items which show that respondents are active over a wide political, fraternal and ideological front, and are not content to direct their legislative efforts to measures which have an immediate effect on railroad labor but engage in a variety of activities involving general positions on candidates and political issues of a very broad scope. For instance, the editorial page of the issue of LABOR for November 29, 1952 (Plaintiffs' Ex. 17), has an article about the election to Congress of Mr. Thomas J. Dodd, of Hartford, Connecticut. Describing Mr. Dodd as a "liberal crusader," the account states that he "won easily, with the backing of rail labor."

The editorial page of the December 6, 1952, issue (Plaintiffs' Ex. 18) contains an account of a study by James L. McDevitt of the nationwide election the month before. McDevitt was said to be "director of labor's league for political education, the political arm of the A. F. of L." The following extracts from this account are pertinent:

> "As for Congress, LABOR has previously reported the fact that the great majority of candidates indorsed by railway labor and organizations were triumphant. McDevitt said that was also true of those backed by the A. F. of L. League.
>
> "Loss of some progressive Democrats was partly counter-balanced, he declared, by the defeat of quite a few Republican reactionaries in both the Senate and House.
>
> "McDevitt estimated that 'labor's friends' in the Senate are down from 40 to 38, and in the House, he said, labor can count on at least 159 members and perhaps on 36 others 'whose attitude is uncertain.'

"That is much better than the 80th Congress (elected in 1946) 'when we had only 83 friends out of 435 House members,' he asserted."

This same issue of LABOR also demonstrates the continuing efforts of respondents to foster class warfare. The editorial page just referred to contains a column headed: "Buyers Aplenty For Furniture at 'Snob' Level." It reads in part:

"Don't worry about the rich and their high taxes. They still have plenty of money to spend after paying the taxes about which they complain so loudly. Among those who know it are the makers of expensive furniture.

• • • • •

"These dealers in snobbery also have never been troubled with such things as credit controls, which bothered ordinary furniture dealers until 'regulation W' was lifted. Their customers always pay cash. And their business has been increasing every year since the Second World War."

The issue of LABOR for April 18, 1953 (Plaintiffs' Ex. 21), on its front page, contains an extensive account of: "Lobby Pushing Campaign for New 'Millionaires Bill.'" It states at the outset:

"The 'Rich Men's Lobby' is determined to put over the 'Millionaires' Amendment' in one way or another That is made clear by a special bulletin issued by the Committee for Constitutional Government, the reactionary propaganda and lobbying organization lavishly financed by wealthy men and corporations."

The article continues:

"This year, partly because of good work done by state legislative representatives of railroad unions, not a single additional state House or Senate has okayed the evil proposal, and several have voted it down."

The first page of the issue for May 2, 1953 (Plaintiffs' Ex. 22), has an article entitled: "Senate Drive Starts Against Realty Lobby," which reports that:

> "Organized labor and progressive members of the Senate this week mapped a battle to block the housing slaughter voted by the Tories in the House."

The Supreme Court of Texas recognized petitioners' showing that union funds are used for political activities. It said:

> "They [petitioners] cite from the record before us one or more instances of political assessments made by one of the defendant unions and discuss generally the political activity of union labor. They quote from union organ statements by union leaders of their intention, past and present, to support measures and candidates deemed favorable to their cause and the necessary implication is drawn that some union funds are and will be devoted to political activity." 295 S. W. 2d at 416.

The Court also stated:

> "Surely the United States Supreme Court in consideration of the *Hanson* case, if not otherwise, judicially knew of union political activity and that funds to carry on that activity are essential. We are of course bound by that decision and can say no more than [quoting *Hanson*] 'if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.'" *Ibid.*

In dissent, speaking for himself and Justices Griffin and McCall, Justice Smith said:

> "The record in this case shows that the unions in this case are political organizations as well as bargaining agencies, and that the Clerks' Union levied a political assessment against at least one worker. The recent holding of the United State Supreme Court in

> the *Hanson* case is authority for the issuance of an injunction to restrain the unlawful assessments above enumerated." 295 S. W. 2d at 427.

Petitioners do not believe that in *Hanson* this Court intended to take judicial notice of union political activities and extend constitutional approval to their use of regular fees and dues for such purposes. The record there showed only that respondents are empowered by their constitutions and by-laws to engage in an unlimited range of political, fraternal and ideological activities. The record here, however, not only contains the same constitutions and by-laws but also—as outlined above—a wealth of uncontradicted evidence that respondents not only can but regularly do divert a part of initiation fees, dues and assessments to political and fraternal activities, as well as ideological objectives.

If petitioners' understanding of this aspect of *Hanson* is accurate, the holding of the majority of the Texas court quoted above is in error. The consequences of that error are such that this point alone warrants review.

The Texas court did say that "a political assessment was not contemplated by the Congress in using the term 'assessments' in the union shop statute, nor that the failure to pay a political assessment would be a valid ground for discharge." 295 S. W. 2d at 416. But respondents doubtless would not levy a specific "political assessment" and thereafter insist on the discharge of employees who refused to pay. The most difficult problem lies not in open assessments as such but in the insidious hidden assessments involved in diversion of sums from regular fees and dues to political purposes. Through such hidden assessments, members cannot tell when or how much they are contributing to the political objectives of the leaders of their union.

Petitioners submit that the Union Shop Statute must fall

as a patent invasion of employees' political liberty, freedom of speech, and freedom of conscience secured by the First, Fifth and Ninth Amendments. In the words of the preamble to the Virginia Statute for Religious Freedom, drafted by Thomas Jefferson and adopted by the Virginia General Assembly in 1875 and forming a part of the historical background explanatory of the import of the whole Bill of Rights:

> "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Brant, *James Madison, The Nationalist 1780-1787* (Bobbs-Merrill, 1948), 354.

Petitioners cannot believe that in order to raise these questions they must first join a union under compulsion of a union shop agreement and thereafter come into court and plead and prove that a specified portion of the sums paid by them has been expended in support of a political, fraternal or ideological cause with which they disagree. Under this record it is clear that respondents engage in a wide scope of political and ideological activities, and that payments which they propose to wring from employee petitioners will be deposited in union treasuries and used in part for those purposes. It is settled law that it it not what has been done under a statute which the measure of its constitutionality but rather what can be done. *Montana Co.* v. *St. Louis Mining & Milling Co.*, 152 U. S. 160, 170; *Eubank* v. *Richmond*, 226 U. S. 137, 144. Here the record shows not only what can be done but what has been done in the past and inevitably will be done in the future. Accordingly, the Union Shop Statute must fall as an unconstitutional invasion of employees' political liberty, freedom of speech and freedom of conscience guaranteed by the First, Fifth and Ninth Amendments.

II.

Application of *Hanson* to the Facts of This Case Requires Affirmance of the Trial Court's Injunction Which Was Directed to Respondents' Demand for a Contract Making Full Union Membership a Condition of Employment.

Respondents' demand restrained by the injunction issued by the trial court was not for a contract requiring all workers to do no more than pay regular union fees. As shown by this record, respondents refused even to discuss permitting non-union people to pay bargaining fees without being compelled to become full union members. (SF. 796.) Respondents have never denied that such is the nature of their demand. This case was tried on the theory that their objective was full union membership.

The trial court judgment makes it plain that the injunction issued was to protect employee petitioners from being forced to choose whether to become full union members or be fired from their jobs. Paragraph II thereof finds that the Union Shop Statute "in its natural operation and effect and in its inevitable operation *as shown by the evidence in this case* • • • brings about a union shop agreement • • • which forces employees • • • against their will to become and remain members of a private organization, to pay initiation fees, dues, and assessments thereto, *and to be subjected to the discipline, control and government of such private organization,* or in the alternative, to suffer loss of their jobs." (Tr. 231, Emphasis supplied.)

In its *Hanson* decision, this Court stated:

> "The only conditions to union membership authorized by Section 2, Eleventh of the Railway Labor Act are the payment of 'periodic dues, initiation fees, and assessments'." 351 U. S. at 235.

Subsequently, it added:

> "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." 351 U. S. at 238.

In the case at bar, the majority of the Supreme Court of Texas stated that:

> "* * * [T]he membership requirements of this contract and of the union shop statute are merely formal and fictional aside from the financial obligation." 295 S. W. 2d at 415.

And, by way of supplement, it said:

> "The unwilling employee need assume no pledge of conformity nor promise of obedience, nor even make application for membership to retain employment under the union shop contract." 295 S. W. 2d at 416.

The Supreme Court of Texas correctly interpreted the decision of this Court in *Hanson* as holding that under the Union Shop Statute no union "member" can be compelled as a condition of employment to submit to any condition of "membership" other than payment of regular union fees. But it has erroneously applied that holding to this case for it is clear that here respondents demanded under threat of a strike a contract making full union membership a condition of continued employment. It should have reversed the Court of Civil Appeals and affirmed the trial court.

The three Justices who dissented below stated that they would modify the injunction to leave room for a contract calling for nothing more than money payments. The majority acknowledged that respondents had refused to consider any arrangements which would excuse employees from the obligations of full union membership. "But," they con-

cluded, "a misconception on the part of the unions as to the effect of the union shop contract would not warrant us in upholding an injunction against the execution of that contract." 295 S. W. 2d at 415.

Thus, while recognizing that respondents' demand exceeded the limits of the law, the court below refused to grant the relief called for. As now appears from *Hanson*, respondents were wrong to the extent that their demand went beyond money payments, and their excessive demands—which to this day have never been withdrawn—should be enjoined.

The majority of the Texas court evidently construed *Hanson* as holding that an injunction could issue only after a contract had been signed and an effort made to enforce it in a manner not permitted by the Union Shop Statute. But that was not the holding in *Hanson* and cannot be a basis for denial of injunctive relief under the record here. The character of respondents' demand is clear. And, as specifically found by the jury: (1) it was the intention of the unions to call a strike to force Santa Fe to sign a union shop agreement, (2) if a strike were called it was reasonably probable that Santa Fe would sign a union shop agreement, and (3) if a union shop agreement were signed it was reasonably probable that the employees and Santa Fe would suffer irreparable injury. (See Special Issues 3, 7-A, 10, 11, Appendix C, *infra*, pp. 85, 86, 87.)

This is a classic case for injunctive relief. In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593, this Court itself said:

> "* * * One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

And, in *Swift & Company* v. *United States*, 276 U. S. 311, 326:

> "* * * [A] suit for an injunction deals primarily, not with past violations, but with threatened future ones; and * * * an injunction may issue to prevent future wrong, although no right has yet been violated."

Given the error of the unions to the extent that they demanded more than money payments, how could a court of equity rule that the parties must first sign the unlawful contract demanded and then await efforts at enforcement before seeking relief?

III.

The Union Shop Statute Imposes a Tax for Private Purposes and Delegates to Private Parties the Sovereign Power to Tax in Violation of the Fifth Amendment.

Petitioners further contend that the Union Shop Statute is unconstitutional for the reason that insofar as it authorizes or requires involuntary money payments to a private organization as a condition of employment it is an unlawful exercise of the taxing power.[6] And not only does it authorize taxes to be paid to private organizations but it vests in those organizations unlimited authority to determine the amounts of those taxes.

A tax requires money payments by those subject to its exaction and only governments have power to levy taxes. Discounting its authority to levy fines and penalties, Congress can require money payments only through exercise of the power to tax granted by Article I, § 2, cl. 1, of the Constitution. It is settled that this power to tax is limited by the requirement that taxes be levied only for a "public purpose". *United States* v. *Butler*, 297 U. S. 1, 65. As this Court said in *Loan Association* v. *Topeka*, 20 Wall. 655, 664:

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6. Petitioners presented this argument to the Court of Civil Appeals as a part of their Second Counterpoint. It was also presented at length in the second oral argument before the Supreme Court of Texas.

> "We have established, we think, beyond cavil that there can be no lawful tax which is not laid for *a public* purpose." (Emphasis the Court's.)

Insofar as the Union Shop Statute authorizes involuntary payments to a union, it is unmistakably an imposition of a tax. As a tax, it can be sustained only if it is for "a public purpose". But dues, fees and assessments exacted under the Union Shop Statute are not directed to the United States for expenditure in the interest of the public as a whole. They are paid into union treasuries for use according to the direction of union officials. Patently, a tax for the benefit of a private organization is not for a "public purpose" and must be held an invalid exercise of the taxing power.

When confronted with a tax in favor of private interests, this Court, in *Loan Association* v. *Topeka, supra,* said:

> "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms." 20 Wall. at 665.

Respondents assert that taxes in their favor are justified by the "benefits" they secure for all they represent. However, this Court, in *Loan Association* v. *Topeka, supra,* determining whether "a public purpose" was to be served by the tax there involved, emphatically rejected the contention that the test should be whether the public was benefited:

> "If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promotors of the public good, and

equally deserving the aid of the citizens by forced contributions." 20 Wall. at 665.

Payment of taxes, of course, is not a voluntary matter—civil remedies and penal sanctions are provided for enforcement. To suggest that the payment of money to a union is voluntary and not a tax because the employee may avoid it with impunity by quitting his job and getting another, is wholly unwarranted. This Court has given short shrift to a similar contention. *United States* v. *Butler, supra,* at 70-71. A choice whether to pay or give up one's chosen means of earning his livelihood is no choice at all.

IV.

Considering Jury Findings and Evidence Found in the Record of This Case But Absent from the Hanson Record, the Union Shop Statute Deprives Employee Petitioners of Their Right to Work, Freedom of Association and Property in Violation of the First and Fifth Amendments.

In *Hanson,* this Court reaffirmed that the due process clause of the Fifth Amendment guarantees a right to work in the common occupations of life,[7] and that the First Amendment secures freedom of association, freedom of conscience, and freedom of thought.[8]

This Court there rejected the contention that the Union Shop Statute unconstitutionally deprives railroad employees of their right to work on the ground that "Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce" if

7. *Truax* v. *Raich,* 239 U. S. 33, 41; *Smith* v. *Texas,* 233 U. S. 630, 636; *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410.

8. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 33, 34; *Amalgamated Workers* v. *Edison Co.,* 309 U. S. 261, 263; *Thomas* v. *Collins,* 323 U. S. 516, 539; *Auto Workers* v. *Wisconsin Board,* 336 U. S. 245, 259.

it were "to require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs. * * *" 351 U. S. at 235.

This holding was made without the benefit of uncontradicted evidence and a jury finding which respondents have never contested contained in this record but not found in *Hanson*. Petitioners' witness, Dr. Leo Wolman, a Professor of Economics at Columbia University, testified that he had conducted a study of respondents' growth during the years 1934-1951 when Sections 2, Fourth, and 2, Fifth, of the Railway Labor Act,[9] made any form of compulsory union membership not only unlawful but a criminal offense punishable under Section 2, Tenth, of the Act.[10] During the years in question the non-operating railroad unions trebled their membership, extended their bargaining jurisdiction to cover, for practical purposes, every mile of railroad track in the United States, and registered large gains in their financial positions. (S.F. 1443-1456; Railroad Exs. 51, 53.)

Respondents' economic witness, Dr. Frederic M. Meyers, an Associate Professor of Economics at the University of Texas, conceded on cross-examination that compulsory membership is not "necessary" to the unions. (S.F. 1773.)

In response to Special Issue No. 13, the jury in this case specifically found that "the signing and enforcement of a union shop agreement is not necessary to the continued existence and well-being of defendant labor unions." (Tr. 157.)

The Court of Civil Appeals at Amarillo recognized the emptiness of respondents' fears about loss of "security." It said:

> "Counsel for appellants repeatedly refers to the issue in this cause as one involving 'union security.'

9. 45 U. S. C. §§ 2, Fourth, Fifth.

10. 45 U. S. C. § 2, Tenth.

> Only a casual survey of the acts of Congress and of the pertinent decisions of the Supreme Court of the United States on this issue should wholly dispel any fear entertained by appellants' attorney as to loss of 'union security'." *International Association of Machinists* v. *Sandsberry*, 277 S. W. 2d 776, 778.

The Grand President of respondent Brotherhood of Railway Clerks, Mr. George M. Harrison, appeared as the principal witness before committees of Congress for all of respondent unions in support of the bill which ultimately became the Union Shop Statute. Congressman Harris, a member of the House Committee on Interstate and Foreign Commerce, asked him whether the union shop would strengthen the organizations' bargaining position. In reply, he admitted that it would not have that result and added that a union gets as much economic strength as it will ever have once it becomes the bargaining agent for a craft or class through the vote of a majority of employees in that craft or class.[11]

In 1942, President Roosevelt, as authorized by the Railway Labor Act, appointed an Emergency Board to consider a demand for a union shop advanced at that time by respondents. Headed by Dr. I. L. Sharfman, Professor of Economics at the University of Michigan and a distinguished transportation authority, that Board not only rejected respondents' demand as unlawful but went further and rejected it on the ground that it was unnecessary to respondents' "security" because they had registered a significant growth record without it and were in no danger from "predatory rivals" or carrier opposition.[12]

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11. *Hearings Before Committee on Interstate and Foreign Commerce on H.R. 7789*, 81st Cong., 2d Sess. (1950), 20-21.

12. Supplemental report to the President by the Emergency Board, May 29, 1943.

That the right to work is invaded by compulsory union membership as a condition of employment was recognized by this Court in *Hanson*. With respect to freedom of association and other rights asserted under the First Amendment, the Court there said:

> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record."

But the only common denominator between membership in an integrated bar as a condition of practicing law and membership in a labor union as a condition of engaging in one of the ordinary occupations of life is that in each periodic money payments are required as a condition of retaining membership in good standing. There the analogy ends.

A lawyer is an officer of the court, and thereby an officer of the government. His practice of law is not a right but a privilege. *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 12 N. W. 2d 515, 518. He is not in the same situation as a man engaged in one of the ordinary occupations of the community. In states where membership in an organized bar is required by law, the grouping does not take the form of a private association but that of an official governmental body. *State Bar* v. *Superior Court*, 207 Cal. 323, 278 P. 432, 434.

Unions, on the other hand, are private associations. It does not follow that because an officer of the court may be required to belong to a governmental organization a man engaged in one of the ordinary occupations of life may be required to belong to a private organization. *In re Scott*, 53 Nev. 24, 292 P. 291, 295.

Petitioners respectfully submit that compulsory unionism sanctioned by the Union Shop Statute clearly invades the freedom of association of all workers subject to its terms. Whether "membership" involves money payments and no more, whether it involves voluntary application for and acceptance of "membership" or whether it involves "full membership" including subjection to union disciplinary authority, the result is the same—deprivation of freedom of association. In any case the worker is required unwillingly to join as a "member" in the ordinary sense or as a "member" in the sense of financial support. A man who pays initiation fees, dues and assessments to a private organization necessarily supports the organization and its programs, so that these payments alone impose on him many of the responsibilities of membership.

The right to work is protected not only against complete prohibitions but also against imposition of unreasonable, arbitrary and capricious conditions. *Smith* v. *Texas*, 233 U. S. 630, 636. And freedom of association, as one of the First Amendment freedoms which enjoy a "preferred" constitutional position,[13] can hardly be accorded a lesser degree of protection than the right to work. If, as Mr. Justice Douglas said in *Barsky* v. *Board of Regents*, 347 U. S. 442, 472, the right to work is "the most precious liberty that man possesses," then the rights of employee petitioners threatened by respondents must be accorded the most strict constitutional protection and the Union Shop Statute must be evaluated by the most stringent measures. "It is the character of the right, not of the limitation, which determines what standard governs." *Thomas* v. *Collins*, 323 U. S. 516.

Considering the evidence in this record as to union ex-

13. *Thomas* v. *Collins*, 323 U. S. 516, 529-530; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Palko* v. *Connecticut*, 302 U. S. 319, 325.

pansion during the years 1934-1951 when all forms of compulsory unionism were banned from the railroad industry, together with the jury finding that a union shop is not necessary to the unions' "continued existence and well-being," the concession of respondents' economic expert that a union shop is not "necessary," and the admission of their principal witness before Congress that a union shop would not strengthen the unions' bargaining position, and the conclusion inevitably follows that the Union Shop Statute must fall as an unconstitutional invasion of railroad employees' right to work and freedom of association. If there are no pressing circumstances to justify the Statute's invasion of these most fundamental rights—and none have been shown either before Congress or the courts—then the Statute cannot be sustained.

Nor can the complaint of respondents before Congress about their representing workers who belong to another union or to no union justify the Union Shop Statute. Workers who do not belong to the organization representing their craft or class are branded "free-riders." But they are not "free-riders" at all. They provide consideration in full measure when they are forced to surrender their right to bargain through a union of their own choice and their right to bargain for themselves in favor of the union selected by the majority in their craft or class.[14]

Additionally, at no time have respondents claimed that they need the money that would come in from persons forced to join or support a union in order to keep their jobs. The state of their treasuries would belie such a claim, as would their representations prior to the Union Shop Statute that their fees were reasonable.

Petitioners' contentions are not directed against trade

14. *American Communications' Ass'n.* v. *Douds*, 339 U. S. 382, 401-402; *National Maritime Union* v. *Herzog*, 78 F. Supp. 146, 155-156, aff'd. 334 U. S. 854.

unionism. Rather, their sole objection is to compulsory unionism, and, as shown by the uncontradicted evidence in this record, strong and effective trade unionism is in no way dependent upon compulsory membership.

The principles involved here turn on fundamental concepts of constitutional law and not considerations of legislative policy. It is too late to deny that a right to work in one of the common occupations of life and a freedom of association—which includes the right not to join a labor union as well as a right to join—are guaranteed by the Bill of Rights. Although, like other constitutional rights, these may not be absolute at all times and under all circumstances, they cannot be denied or abridged except upon a showing of the most compelling necessity. Not only has there been no such showing to justify the Union Shop Statute, but the record in this case demonstrates the complete absence of any such necessity.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE.

I, J. C. Gibson, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of March, 1957, I served copies of the foregoing Petition for Writ of Certiorari on respondents by mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, to their attorneys of record as follows:

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1625 K Street
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J. C. GIBSON

APPENDIX A.

TEXT OF THE UNION SHOP STATUTE, SECTION 2, ELEVENTH, OF THE RAILWAY LABOR ACT, 45 U. S. C. § 2, ELEVENTH.

Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor oganizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of

any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to

him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.

APPENDIX B.

OPINION OF THE

SUPREME COURT OF TEXAS.

July 25, 1956.

Rehearing Denied December 5, 1956.

M. E. Sandsberry, Jr., et al., and Gulf, Colorado and Santa Fe Railway Company et al., *Petitioners,*

vs.

International Association of Machinists, et al., *Respondents.*

No. A-5061.

CULVER, *Justice.*

Certain employees of petitioner, Railway Company, instituted this suit for themselves and on behalf of all other employees similarly situated against Santa Fe Railway Company and sixteen non-operating railway labor unions to restrain them from entering into a union shop agreement, and to restrain and enjoin the unions from striking or using other economic force to compel Sante Fe to enter into such contract.

Santa Fe answered, consenting to the relief sought, and

by cross-action against the unions, itself sought an injunction against the unions to restrain them from using economic force to compel a "union shop" contract. Judgment in the trial court resulted in favor of petitioner employees and Santa Fe, and the relief prayed for was granted. On appeal the Amarillo Court of Civil Appeals reversed and dissolved the injunction. 227 S. W. 2d 776.

The trial court concluded that Section 2 Eleventh of the Railway Labor Act as amended, 64 Stat. 1238, 45 U. S. C. A. § 152 Eleventh,[1] known as the union shop

1. "Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner. * * *."

statute is unconstitutional and void and therefore the Right-to-Work Statute, Art. 5207a, Vernon's Ann. Civ. Stat., is applicable within the State of Texas forbidding the execution of any union ship contract that makes membership in a union a condition of employment between the parties. The United States Supreme Court in the recent case of *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225, 76 S. Ct. 714, 715, has held to the contrary.

In their supplemental brief petitioners assert that under the issues and facts in this case the *Hanson* decision requires an affirmance of the trial court's judgment enjoining the execution of a union shop contract compelling full union membership and that the record here presents the constitutional issues which the court did not decide in the *Hanson* case for the reason that they were not brought before the court in that record.

The contract proposed by respondent unions to the Santa Fe was worded substantially in terms of the union shop statute and apparently similar in all respects to the contract under attack in *Hanson*. The nature of that contract is described by the court as follows:

> "This is a suit brought in the Nebraska courts by employees of the Union Pacific Railroad Co. against that company and labor organizations representing various groups of employees of the railroad to enjoin the application and enforcement of a union shop agreement entered into between the railroad company and the labor organizations. Plaintiffs are not members of any of the defendant labor organizations and desire not to join. Under the terms of the union shop agreement all employees of the railroad, as a condition of their continued employment, must become members of the specified union within 60 days and thereafter maintain that membership. It is alleged that failure on their part to join the union will mean the loss of their employment together with seniority, retirement, pension, and other rights."

Petitioners vigorously urge that the proposed contract makes the absolute requirement that nonunion employees become full union members. But it no more requires full union membership than does the contract in *Hanson* and as expressly held in that case the contract does not compel full membership.

The petitioners principally argue here that the record in our case shows many facts and circumstances that were not contained in the *Hanson* record, all of which bear, they say, on the practices of the unions, the requirements laid down in their constitutions and by-laws for membership, the disciplinary control exercised by the unions over their members, the obligations a member must assume and the unions' interpretation of the statutory requirements.

While this record does contain probably more factual data, for the most part, it would seem to be cumulative and amplified rather than distinctive. Basically, we think, evidence of the same facts was before the court in the *Hanson* case for that decision quotes liberally in footnotes from the constitutions and by-laws of a number of the respondent unions that place certain restrictions upon the freedom of activity and expression of its members and provide, among other things, for compulsory dues and assessments to finance insurance and death benefit plans. A large part of petitioner's supplemental brief is devoted to a discussion of the provisions of these same constitutions and by-laws that were in the *Hanson* record and noted by the court.

The legislative history of the union shop amendment indicates an intention on the part of Congress only to eliminate the so-called "free rider problem". It was asserted in debate that the strife and dissatisfaction existed among the rank of the union members because of the fact that nonmembers received the benefit of representation without contributing their pro rata share of the bargaining expense. 96 Cong. Rec., p. 16374 *et seq.* Mr. Justice

Douglas made this point in quoting from the remarks of Senator Hill who managed the bill on the floor of the Senate: "The question in this instance is whether those who enjoy the fruits and the benefits of the union should make a fair contribution to the support of the unions." Id. p. 16279.

Additionally, in our case it was shown that the union committee after making demand for a union shop contract, refused to discuss or consider changes to provide only for the payment of fees or charges to defray the permanent cost of collective bargaining. But a misconception on the part of the unions as to the effect of the union shop contract would not warrant us in upholding an injunction against the execution of that contract.

The testimony also reveals that in the past other railroads, after the execution of a similar union shop agreement, lost hundreds of employees by discharge or resignation. Some five or six witnesses testified that they had been discharged, two of them for refusing to take the oath of union membership. But regardless of any conditions for membership set forth in any union constitution or by-laws, or any discharges or resignations that have taken place as a result of the union shop contract on any other railroad lines, the membership requirements of this contract and of the union shop statute are merely formal and fictional aside from the financial obligation. Of course all of the resignations and discharges referred to above occurred before the *Hanson* decision and may have resulted as a misinterpretation of the legal effect of the contract. Both the statute and the contract expressly provide that the requirement of membership as a condition of employment shall not apply "to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penal-

ties) uniformly required as a condition of acquiring and retaining membership."

The *Hanson* opinion holds that "the enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates." It also observes that "Congress endeavored to safeguard against that possibility, [*i.e.* that compulsory membership will be used to impair freedom of expression] by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments' ". The unwilling employee need assume no pledge of conformity nor promise of obedience, nor even make application for membership to retain employment under the union shop contract.

Although the Supreme Court in *Hanson* only held "that the requirement for financial support of the collective-bargaining agency by all who received the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments", it upheld the union shop agreement theretofore entered into between the unions and the railroads, and left open the question as to any objection that may be raised to the use by the unions of these funds.

As to the matter of financial support petitioners say: "Perhaps the most decisive fact leading the Supreme Court of the United States to conclude that violation of the First and Fifth Amendments was not shown in the *Hanson* case was its inability to find upon the record in that case that the members' funds may be used to carry on political activities imposed by them." They cite from the record before us one or more instances of political assessments made by one of the defendant unions and discuss generally the political activity of union labor. They quote from union organ statements by union leaders of their intention, past and present, to support measures

and candidates deemed favorable to their cause and the necessary implication is drawn that some union funds are and will be devoted to political activity.

We think a political assessment was not contemplated by the Congress in using the term "assessments" in the union shop statute, nor that the failure to pay a political assessment would be a valid ground for discharge. But the contract has not been signed, no one has been discharged for refusal to pay any dues or assessments. Surely the United States Supreme Court in consideration of the *Hanson* case, if not otherwise, judicially knew of union political activity and that funds to carry on that activity are essential. We are of course bound by that decision and can say no more than "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case."

The judgment of the Court of Civil Appeals dissolving the injunction must be affirmed.

GRIFFIN, SMITH and MCCALL, *JJ.*, dissenting.

CALVERT, *Justice* (concurring).

My purpose in filing this opinion is to express my apprehension concerning those portions of the majority opinion which undertake at this time to interpret an unexecuted contract and to define judicially, in advance, certain rights of the parties under the contract. I refer specifically to the following statements: "* * * the membership requirements of this contract and of the union shop statute are merely formal and fictional aside from the financial obligation. * * * The unwilling employee need assume no pledge of conformity nor promise of obedience, nor even make application for membership to retain employment under

the union shop contract. * * * We think a political assessment was not contemplated by the Congress in using the term 'assessments' in the union shop statute, nor that the failure to pay a political assessment would be a valid ground for discharge."

It is my view that at the foregoing issues are prematurely raised and prematurely decided. A question certain to be raised hereafter is whether the quoted rulings are pure obiter dicta or whether they are res adjudicata of the matters there decided. I do not mean to indicate that I would disagree with most of what has been said on the issues if they were here; I simply disagree that they are here.

In passing I point out that what has been said with respect to the rights of the parties to a contract made pursuant to paragraph (a) of Section 2 Eleventh leaves little, if any, difference in the meaning of that paragraph and paragraph (b) of Sec. 2 Eleventh. See footnote, majority opinion. Now obviously these paragraphs were not intended to have the same meaning.

I particularly do not wish to be bound by the holding that an employee may not be required to make application for membership in the union in order to obtain or retain employment. If a contract be executed requiring union membership as a condition of retaining employment some means must be afforded non-union employees for indicating to the unions their wish to become members. The unions could hardly be expected to admit to membership those who were unwilling to apply therefor. The tendered contract requires, in the terms of the statue, that all employees shall, within sixty days from the date of the agreement, become members of the union as a condition of their continued employment. It seems to me that an application for membership may well be a necessary part of the mechanics for determining whether an employee wishes

and is granted union membership. This is not to say that unions could include in an application, against the wish of the signing employees, pledges of conformity and promises of obedience.

McCALL, *Justice* (dissenting).

I believe that the opinion of the Court of Civil Appeals should be reversed and that of the trial court affirmed, and therefore respectfully dissent.

While this case involves the application of the First Amendment to compulsory membership in modern labor unions, the question presented is as old as American history. The First Amendment was adopted in 1791 after a continuous struggle beginning in 1607 against compulsory membership in private organizations and compulsory support thereof. "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." *Dennis* v. *United States,* 341 U. S. 494, 523, 71 S. Ct. 857, 873, 95 L. Ed. 1137.

It will be recalled that in nine of the original American colonies an "established" church existed and was supported by public funds until the time of the American Revolution. During the first half of the seventeenth century these established churches were the most influential organizations in the lives of the colonists. Three requirements were made by law of all persons, that they (1) attend the official church, (2) pay church taxes to support the official church, and (3) subscribe to the ideology of the official church. Dissenters were persecuted and punished by the colonial governments in a variety of ways. They were fined, deprived of civil rights, imprisoned, whipped, banished, and hanged. However, the unremitting

struggle against such compulsion soon compelled the established churches to make compromises such as the New England Half-Way Covenant of 1657, which required only formal membership and financial support but dispensed with the necessity of ideological conformity.

By the time of the Revolution only financial support by way of special taxes was required of those not members of the established organization. The crucial struggle came in the Virginia House of Delegates in 1784 over a bill for a "general assessment" for the maintenance of religion. No less an orator than Patrick Henry urged that since religion promotes happiness and prosperity for all, every citizen should be compelled by law to contribute to the support of his church. Proponents of the bill advanced the original form of the argument against free riders. Since all citizens benefitted from the program of the church, all should help pay therefor. (In the majority opinion and in the *Hanson* decision Senator Hill is quoted: " 'The question in this instance is whether those who enjoy the fruits and the benefits of the union should make a fair contribution to the support of the unions'." If "churches" is substituted for "unions," it will be seen that the Senator parroted an argument long ago repudiated by Americans).

The opponents of the general assessment bill led by James Madison supported an opposition bill drafted by Thomas Jefferson, entitled Statute of Virginia for Religious Freedom, which declared in its preamble "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." The general assessment bill was defeated and the Statute for Religious Freedom adopted in 1786, and Madison wrote Jefferson: "I flatter myself we have in this country extinguished forever the ambitious hopes of making laws for the human mind." (Apparently the gift of prophecy was not among Madison's endowments.)

It was upon this issue of compulsory support of private organizations that the dissenters in Virginia in 1788 led by Elder John Leland resisted the movement to adopt the proposed federal constitution until its proponents agreed to a Bill of Rights, including as its first provision of the First Amendment the guarantee that there would be no establishment of religion. It is well to remember that at the time of the adoption of the First Amendment that neither ideological conformity nor even formal Half-Way Covenant membership was any longer being demanded. The chief evil to be forever prohibited was compulsory financial support of a private organization by those who did not subscribe to its program.

Today various forms of the ideology of materialism command the allegiance and support of half the world. This ideology has its own varied organizational forms, one of which is the labor union, that in some instances exercises as great an influence over the lives of its members as did the established churches of Colonial days. By the 1951 amendment to the Railway Labor Act Congress provided for a new type of establishment suitable to the modern ideology. The authority of the federal government is enlisted in support of compulsory membership in private labor organizations and compulsory support thereof. The statute does not require ideological conformity but merely harkens back to the Half-Way Covenant and requires merely formal membership and financial support of the unions. In *Railway Employees' Department* v. *Hanson*, the Federal Supreme Court seems to construe the amendment, Section 2 Eleventh of the Act, as requiring not even formal membership but only that the non-members pay to the organization such dues, fees, and assessments that are reasonably allocable to the cost of collective bargaining. Thus the new Half-Way Covenant is not upheld but the taxes for the new

establishment are declared not violative of the First Amendment.

The question in the present case is whether the contract demanded by the labor unions in their negotiations calls for (1) ideological conformity, (2) formal membership, or (3) financial support. Petitioners argue that the record supports the trial court findings that respondents, the unions, are demanding a contract which provides for (1), (2) and (3). Respondents argue that "full membership" with ideological conformity is not being demanded, but only items (2) and (3). They argue that the contract in this case is literally the same as in the *Hanson* case, which used the words of Section 2 Eleventh of the Railway Labor Act that "all employees shall become members of the labor organization." In my opinion the contracts are not necessarily the same because some of the "labor organizations" are not the same. A contract "to become a member of the political party" will have widely different meanings as it is applied to the Democratic Party, the Republican Party, the Prohibitionist Party, and the Communist Party. Indeed, today such a contract entered into with the representative of the last party above mentioned for even formal membership in the party is so radically different that it often gets the new member into serious trouble, including expulsion from some of the above unions, or in some cases loss of employment.

Almost a score of labor organizations are here involved, varying from boilermakers to bartenders. The requirements of membership as evidenced by their constitutions and by-laws are different. There are as many different contracts here as there are labor organizations. I believe that the evidence in this case supports the judgment of the trial court that the contracts demanded, when interpreted in the light of the record in this case, call for at least compulsory formal membership. The modern ver-

sion of the ancient "test oath" set forth in the dissenting opinion of Justice Smith requires a pledge of ideological conformity for even formal membership.

The majority opinion of the Court interprets the *Hanson* case as sanctioning only compulsory financial support of the new establishment, and that support limited to just the collective bargaining activities of the labor organization. With this interpretation I agree but am of the opinion that the effect of the judgment in this case, in the light of the record herein, is an extension of the rule of the *Hanson* case to cover at least formal membership. Judicial duty compels this Court to follow the *Hanson* case, but does not require us to make the slightest extension thereof.

I believe that under the *Hanson* case the only relationship required of the non-member to the union is that of debtor and creditor. It is the same relationship against which Jefferson, Madison and Leland fought—that the non-member owed the established organization for his proportionate share of the expense of the program from which he allegedly derived benefit and the state compelled payment of this debt. The unions under the *Hanson* case are entitled to demand that the railroad, by a check-off system, collect the debt which they claim the non-members owe them. Since the unions have demanded much more, they were properly enjoined.

GRIFFIN, *J.*, joins in this dissent.

SMITH, *Justice.*

I most respectfully dissent. In this case the respondents, Labor Unions, in attempting to deny the petitioners-individuals, the right not to join a union are, in effect, destroying the principle of constitutional liberty upon which their very existence is founded. The Union's effort to compel the Santa Fe to enter into the proposed

contract which would ultimately bring about compulsory union membership cannot be sustained by the courts and such a contract between private parties (the unions and the Santa Fe) is not insulated from review for conformity with the Bill of Rights when *governmental action* is otherwise present. In the case of *Steele* v. *Louisville & Nashville Railroad Co.*, 1944, 323 U. S. 192, 198, 199, 65 S. Ct. 226, 230, 89 L. Ed. 173, the United States Supreme Court said that the conduct of a labor union which is authorized by Act of Congress to function as an exclusive bargaining representative sufficiently involves the hand of government to raise questions for review under the Bill of Rights. The Court specifically said: "But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, *did not intend to confer plenary power upon the union to sacrifice,* for the benefit of its members, *rights of the minority of the craft,* without imposing on it any duty to protect the minority. Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act. * * *" (Emphasis added.)

This same principle was announced in the case of *American Communications Association, C. I. O.* v. *Douds,* 1950, 339 U. S. 382, 401-402, 70 S. Ct. 674, 685, 94 L. Ed. 925:

> "* * * Under the statutory scheme, unions which become collective bargaining representatives for groups of employees often represent not only members of the union but nonunion workers or members of other unions as well. Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them. See *J. I. Case Co.* v. *National La-*

bor Relations Board, 1944, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762. The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself. See *Graham* v. *Brotherhood of Locomotive Firemen,* 1949, 338 U. S. 232, 70 S. Ct. 14 [94 L. Ed. 22]; *Steele* v. *Louisville & N. R. Co.,* 1944, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; *Tunstall* v. *Brotherhood of Locomotive Firemen,* 1944, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187; *Wallace Corp.* v. *National Labor Relations Board,* 1944, 323 U. S. 248, 255, 65 S. Ct. 238, 241, 89 L. Ed. 216; *Railway Mail Association* v. *Corsi,* 1945, 326 U. S. 88, 94, 65 S. Ct. 1483, 1487, 89 L. Ed. 2072.

"We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such. *But it is plain that when Congress clothes the bargaining representative 'with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents,'* the public interest in the good faith exercise of that power is very great." (Emphasis added.)

It is by force of the "command of the Act," or authority of the Act, and that alone that the respondent-unions seek to compel the employer, Santa Fe, to enter into a contract and agreement "requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class * * *." The respondent-unions' pleadings in their motion for judgment wherein it was said, "Plaintiffs and cross-plaintiff railroads could be entitled to injunctive relief only if the objective for which

Labor Union defendants were bargaining was unlawful. Congress, however, by passage of the 1951 amendment to the Railway Labor Act unequivocally settled the law applicable to this case. By removing the ban on union shop contracts which the 1934 Congress had enacted, it restored the traditional right of management and labor to enter into union security agreements." After the passage of the 1951 amendment to the Railway Labor Act, the respondent-unions began their efforts to bring about compulsory unionism. The following excerpt from one of the letters written by a vice-general chairman of one of the unions to a nonmember is typical of the attitude of the unions after they had been clothed with powers comparable to those possessed by a legislative body by the amendment of 1951, "You have probably heard through the newspapers or radio or from some other source that our organization together with sixteen co-operating organizations have filed notice upon the Santa Fe as of February 5 for negotiations to amend our agreement to provide for the union shop and check-off system. We are quite confident that our agreement on the Santa Fe will be amended within a reasonable length of time to include provisions for a union shop. The union shop will provide that every employee in service as of the date of the signing of this agreement would be required to tender their application to our organization within sixty days after the revision is signed, or forfeit his right to work. I am sure that you are not one of the few employees who will insist that they must be forced into the organization against their will, but rather one of the employees who, through some misunderstanding or lack of knowledge to what the organization represents, or what it has done for you in the past, has failed to become a member prior to this time; * * *."

It is obvious that the respondent-unions are using the positive legislative action of Congress as a weapon to

force nonmembers to join the union. It is true the Act does not say that the railroads must enter into union security agreements, but the Act, as a whole, even though it says that carriers and unions "shall be permitted to make agreements," has the legal effect and accomplishes the same purpose as though it had provided that carriers shall enter into such agreements. The Act contemplates that upon the signing of a union shop agreement all employees not then members must become members and subject themselves to the disciplinary measures of the union. The statute provides that all agreements shall contain a provision that "all employees shall become members of the labor organization representing their craft or class." Certainly the statute contemplates membership in a union. The purpose is not limited to just the payment of dues. To refuse to accede to the demands of the union could mean but one result. The nonunion member of the craft or class represented by the union bargaining agent under the principle of majority rule would be fired or, to use the words of the respondent-unions, "forfeit his right to work." This governmental action amounts to the government's "thumb" on the scales in favor of the unions and the Act of 1951 is instrumental in depriving the nonunion member of fundamental rights guaranteed by the Constitution and protected by right to work laws in Texas. In order to protect the working man as contemplated by the Constitution of the United States we must recognize that it is just as essential that the right of a man not to join a union be preserved and safeguarded as the right to join a union. By the use of the term "right to work," I do not mean it in the sense of a right to demand of an employer a particular job, or in the sense that an employee, having acquired the job, can say to the employer that he, the employee, cannot be discharged for cause. State right to work laws were not enacted for such purposes. The justifica-

tion for such laws rests primarily on the proposition that Texas recognized the necessity of giving statutory protection to the working man in the enjoyment of his constitutional right to work. This principle has been recognized and upheld by the courts in many suits involving the question of the constitutional right of a worker to join a union. The same principle should be applied in a case such as we have here where men desire to exercise their right of freedom of choice. To deny them this right is to destroy freedom itself. I agree with the petitioners in their statement, "If men are to be free to join unions they must also be free not to join; otherwise they have no freedom of association but a duty or obligation to join an organization selected not by themselves but by others—which is the coercion of the slave state and the very antithesis of the freedom of choice which is the core of American Constitutional liberty." See *Texas & New Orleans R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 1930, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; *Virginian R. Co.* v. *System Federation, No. 40*, 1937, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789; *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 1937, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893.

Returning to the demands made by the respondent-unions upon the individual petitioners in this case, and particularly emphasize the fact that respondents, in writing the nonunion members, as above pointed out, used the very provisions of the 1951 amendment to the Railway Labor Act. It is clear that this lawsuit springs from the wording of the statute itself. The effort to justify their acts by claiming that the statute is merely permissive and that all of their efforts are to reach a voluntary agreement between employer and union leaders and that when such contract is entered into it should be respected is merely a subterfuge to avoid the application of constitutional prin-

ciples. A union shop is not, in a true sense, a voluntary arrangement. Respondents' actions in this case reveal coercive methods not only against the employees who do not desire to submit to the disciplinary power of the union and thereby sacrifice their freedom guaranteed under the Constitution and the Bill of Rights, but also are acts of coercion against the petitioners, railroads, as well. The evidence shows that the objective of respondent-unions is to ultimately force all employees to join a union, and the freedom of contract they seek is the freedom of the employer to contract with the unions that all employees must join a union. Although the respondent-unions have been designated as the bargaining representatives of their respective crafts, they completely ignore the rights of the minority, in this case the nonunion members, and demand a contract in accordance with the terms of the statute, the 1951 amendment to the Railway Labor Act. In other words, they are advocating the converse of the right of the employer to be free to contract with employees that they would not be required to join a union. Respondent-unions are proceeding not only under the general authority of the Act, but, in addition, under the express permission given the respondents by the statute, to demand a compulsory union shop agreement.

In the case of *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831, 838, 166 A. L. R. 342, the Court said:

> "In the light of the history and purpose of the [Railway Labor] Act, as construed in many decisions, the trial court's view that the acts complained of are solely those of 'a private association of individuals' is wholly untenable. The acts complained of are those of an organization acting as an agency created and functioning under provisions of Federal law. This being true, it is unnecessary to consider appellees' contention that the Fifth Amendment is not here applicable because it relates only to action by the Federal

government and not to acts of private persons. Nor do we need to inquire whether appellees' statement as to the operation of the Fifth Amendment is too broadly stated. In any event the constitutional guaranties of due process, whether under the Federal or state constitutions, are to be liberally construed to effectuate their purposes, and are a restraint not only upon persons holding positions specifically classed as executive, legislative or judicial, but upon all administrative and ministerial officials who act under governmental authority. * * * While claiming and exercising rights incident to its designation as bargaining agent, the defendant union cannot at the same time avoid the responsibilities that attach to such statutory status."

The action of the respondent-unions is most assuredly subject to review by the courts because the demands are unreasonable and capricious in that the statute here involved aids the respondent-unions, who are not only bargaining representatives of union members but also of nonunion workers as well, to compel nonunion employees and employers to sacrifice rights which are valuable to them. The unions under the very terms of the Act have been given certain power and authority. This power and authority has been derived at least in part from the government—in this case the 1951 Act of Congress, the amendment to the Railway Labor Act. In fact, the 1951 amendment is the only defense or justification the respondent-unions can offer for their present contentions in this case. The respondents contend that the Supreme Court of the United States did not hold that there was governmental action in the case of *Public Utilities Commission of District of Columbia* v. *Pollak*, 1952, 343 U. S. 451, 72 S. Ct. 813, 820, 96 L. Ed. 1068. In my opinion, the question of governmental action was considered. The Court said in part: "It was held by the court below that the action of Capital Transit in installing and operating

the radio receivers, coupled with the action of the Public Utilities Commission in dismissing its own investigation of the practice, sufficiently involved the Federal Government in responsibility for the radio programs to make the First and Fifth Amendments to the Constitution of the Union States applicable to this radio service. * * * We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments. * * *" The court actually passed upon the constitutional question raised in that case. It was necessary, just as it is here, for the court to do so in order to finally dispose of the case; otherwise, the court would not have passed upon the constitutional questions. See *Arkansas Fuel Oil Co.* v. *State of Louisiana*, 1938, 304 U. S. 197, 202, 58 S. Ct. 832, 82 L. Ed. 1287; *Arkansas Louisiana Gas Co.* v. *Department of Public Utilities*, 1938, 304 U. S. 61, 64, 58 S. Ct. 770, 82 L. Ed. 1149; *Light* v. *United States*, 1911, 220 U. S. 523, 538, 31 S. Ct. 485, 55 L. Ed. 570.

As heretofore pointed out, the Act invested the union with powers it did not otherwise have, and further that no common-law rule renders compulsory unionism lawful, whether brought about by closed or union shop contracts. The respondents contend that the validity of the type of union shop agreement does not involve a constitutional question; that the validity of the contract desired is not tested by the provisions of the First, Fifth and Ninth Amendments to the Constitution of the United States, but that its validity rests on the common law. In support of this position respondent-unions rely on such cases as *Harper* v. *Local Union, No. 520, I. B. E. W.*, Tex. Civ. App., 48 S. W. 2d 1033, wr. dism., and *Underwood* v. *Texas & P. Ry. Co.*, Tex. Civ. App., 1915, 178 S. W. 38, no writ history. Those cases have no application here because of the vast difference in the facts and, further, the cases in-

volved purely private action between private parties *with no governmental action statute* involved such as we have in the case at bar. Therefore, no constitutional issues were presented for decision. The case at bar comes within the rule that wherever government assists private parties, there is sufficient governmental action to require review under the Bill of Rights. A review of the record in this case leads to the inevitable conclusion that the respondent-unions with the aid of the 1951 amendment are attempting to accomplish that which is unlawful and violative of the rights of the petitioners. This does not contemplate a new rule or the extension of the present rule, but it does contemplate an application of the present rule as announced by the United States Supreme Court that freedom rests on choice, and where choice is denied by governmental action freedom is denied as well. If this rule is applicable in racial restrictive covenant cases, then I see no reason why it should not apply in the present case where an agreement is sought which would require compulsory union membership. The ultimate result would be that the unions under the guise of security would obtain a complete monopoly and no nonunion member would ever be able to secure employment in the particular field for which he has been trained. He would be caused by such monopoly to lose not only his seniority rights gained as a result of long and faithful service, but also his right to work as well. As was said in the case of *Phelps Dodge Corp.* v. *National Labor Relations Board,* 1941, 313 U. S. 177, 61 S. Ct. 845, 849, 85 L. Ed. 1271: "Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which is denied for the other." That court also said, "* * * To differentiate between discrimination in denying employ-

ment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed. * * *"

In the case of *Lincoln Federal Labor Union No. 19129, A. F. of L.* v. *Northwestern Iron & Metal Co.*, 1949, 335 U. S. 525, 69 S. Ct. 251, 254, 93 L. Ed. 212, the unions asserted "* * * 'that the right to work as a non-unionist is in no way equivalent to or the parallel of the right to work as a union member; that there exists no constitutional right to work as a non-unionist on the one hand while the right to maintain employment free from discrimination because of union membership is constitutionally protected'." The court, in rejecting this theory said in part: "* * * There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies. The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly."

With governmental action present, as was unequivocally held in the *Hanson* case by the United States Supreme Court on May 21, 1956, the record in the present case authorizes the court to issue its most gracious writ of injunction to restrain the respondent-unions from unlawfully demanding a contract which, if executed and carried out, would destroy the rights given to the petitioners un-

der the First and Fifth Amendments. A brief review of the facts of this case demonstrates the correctness of this conclusion. The testimony of Mr. Daniel P. Loomis, Chairman of the Association of Western Railways, shows that immediately after the passage of Section 2, Eleventh, the Santa Fe, among other railroads, received a formal notice from respondents reading in so far as material as follows:

> "Please accept this as formal notice served in accordance with the procedures of the Railway Labor Act on behalf of all employes we represent of our desire to make an agreement between your company and the employes represented by this organization effective thirty days after date of this letter providing as follows: 'Notwithstanding any provision in any prior agreement between the parties hereto, it is hereby agreed that (a) all employes now or hereafter employed in any work covered by the Rules and Working Conditions Agreement between the parties hereto shall, as a condition of continued employment in such work, within sixty days following the beginning of such employment or the effective date of this agreement, whichever is later, become members of, and thereafter maintain membership in good standing, in the organization party to this agreement representing their craft or class, provided that this condition shall not apply with respect to any employe to whom such membership is not available upon the same terms and conditions as are generally applicable to any other member, or with respect to any employe to whom membership was denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees and assessments not including fines and penalties uniformly required as a condition of acquiring or retaining membership; * * *'."

This demand was rejected. Subsequently, on July 9, July 10, and July 31, 1952, in conferences between Mr. Loomis, representing the Santa Fe and other carriers, and respondent-unions, the unions refused to discuss any agree-

ment under which only money payments would be made to them by non-union employees. Mr. Loomis' testimony in this respect reads as follows:

> "Q. The question has been raised here in connection with the testimony of a number of witnesses as to whether the union is entitled to payment from all members of craft or class employed by the railroad for its services in acting as a collective bargaining agent.
>
> "Was the demand of the non-operating unions for an agreement on this subject at the conference you attended or conferences that you attended, confined to one providing for the payment of fee or charge, for such services? A. No. It was not. As a matter of fact, the union committee stated that they would not be interested even in discussing such an arrangement.
>
> "Q. Was the question asked of them? A. Yes,. On July 9, 10 and 31, during the conferences in Washington, I inquired whether there was anything to be gained by discussing the proposition whereby those covered by collective bargaining agreements would contribute to the cost of collective bargaining but would not have to join a union.
>
> "I was answered by the Chairman of the Non-operating Committee, Mr. Leighty, by Mr. Harrison of the Clerks' Union, and by Mr. Duffy of the Electrical Workers, that particularly they would not be interested in such an arrangement but they wanted a full union shop agreement whereby all employes would be required to join the Union."

Mr. Loomis further testified:

> "Q. Now in these conferences that took place, did the carriers make any alternative proposal to the proposals for the union shop with the check-off? A. We made a direct proposal for maintenance of membership. We explored various other areas. We particularly explored, as I stated yesterday, whether there was any use in discussing any arrangement whereby employes would support the cost of collective bargaining without having to join a union.

"We discussed the United States Steel Settlement; the Western Union agreement which is what is called an agency contract where the employes do not have to join the union.

"We discussed the proposition of exempting employes now in service. The direct offer that we made, however, was a maintenance of membership arrangement.

"Q. Would you explain what is involved in that maintenance of membership arrangement? A. Maintenance of membership arrangement, in ordinary usage, has an escape period of possibly two or three weeks or a month during which employes have the opportunity to decide whether they want to remain members of the union or get out of the union.

"At the end of the escape period all of those who are still members of the union are required to maintain their membership in the union.

"Q. Was that substantially the proposal that the carriers made to the labor leaders? A. That is correct.

"Q. What response did they make? A. It was rejected.

"Q. You said that the carriers' conferees made a number of other proposals over this period of time. I believe you had described some of them? A. I put it that we explored areas of negotiation, whether there was anything to be gained by pursuing a certain line of discussion.

"Q. You mean that you put out feelers to find out what might be acceptable? A. Well, we asked the direct question: Now suppose that we were to discuss making a union shop agreement but the employes now in service would be exempt; is there any use in our considering such a proposition as that? Would you be willing to talk about it? Or after the settlement was made in the steel industry, we studied that contract and explored whether there was any use to follow that up, in discussing there whether we could reach any possibility of a settlement.

"Q. Did you explain yesterday what were the essential provisions of the steel arrangement? A. Yes.

"Q. That was my recollection; now, what response did the union conferees make to these feelers? A. Just one. They wanted a full union shop agreement."

The proposed contract contains Section 1 which is an absolute requirement that nonunion employees should become full union members. That Section reads as follows:

"In accordance with and subject to the terms and conditions hereinafter set forth, all employes of the carriers now or hereafter subject to the rules and working conditions agreements between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in such organization; except that such membership shall not be required of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months. Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreements."

Various other provisions contained in Sections 3-A and 3-C of this same Exhibit make it clear that the contract demanded required full union membership.

The testimony of Mr. John Landreth, one of the railroad negotiators at the conference held the day before plaintiffs filed their suit, testified that respondent unions stated that the contract in the record here as Exhibit No. 1 would be the minimum offer, that it had been pared to the bone, and that there would be no deviation from it. The union representatives further stated that they had no authority to deviate in any way.

The petitioners, through their petition and prayer sup-

ported by evidence, are entitled to an injunction prohibiting the execution of a union shop agreement requiring full union membership. The unions demanded such a contract and threatened to strike to force its execution. The petitioners prayed for an injunction prohibiting respondent-unions from striking, and the injunction granted was warranted by the evidence in this case. The petitioners are entitled to an injunction restraining the respondent-unions from threatening or requiring compulsory union membership to the extent of the payment of dues or assessments for political purposes, or for insurance premiums, or for any purpose other than such sums as are necessary to defray each workers' share of bargaining expense. The record in this case shows that the unions in this case are political organizations as well as bargaining agencies, and that the Clerks' Union levied a political assessment against at least one worker. The recent holding of the United States Supreme Court in the *Hanson* case is authority for the issuance of an injunction to restrain the unlawful assessments above enumerated.

The verdict of the jury establishes that the respondent-unions demanded the full union shop contract. The petitioners are entitled to an injunction in any event under the record in this case to prohibit the unions from requiring the nonunion members to take the following oath:

> "I ....., of my own free will in the presence of Almighty God and this assembly do solemnly promise and declare that I will keep sacred and inviolate this obligation and the secrets of this Brotherhood, and will not repeat outside of the lodge room any transaction whatsoever which may have taken place therein, to anyone other than those whom I know to be members in good standing."

They are entitled under the record in this case to an injunction restraining the execution of a contract which would require full membership in the union; and that an

employee make application; take the necessary oath of allegiance to the union; become bound by its laws, rules, regulations and policies and subject to its discipline. The United States Supreme Court, in the course of its opinion in the *Hanson* case, [351 U. S. 225, 76 S. Ct. 721] delivered on May 31, 1956, said:

> "* * * If other conditions are in fact imposed, [other than periodic dues, initiation fees and assessments] or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments. We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement."

The employees, being forced to make application for membership and to take the necessary oath of allegiance to the union, as above set out, become bound by its laws, rules and regulations and policies and subject to its discipline; upon an attempt on his part to resist discharge from his job, for other causes than nonpayment of dues he will be met with the well-established rule of law that "a labor union has the right to make and adopt reasonable rules and by-laws governing the conduct of its members. So long as the by-laws of a union relate to matters in which no one except the association and its members is interested, and violate no right of a third person and no rule of public policy, they are valid. The articles of agreement of a labor union, whether called a constitution, charter, by-laws, or any other name, constitute a contract between

the members which the courts will enforce if not immoral or contrary to public policy or the law of the land." 31 Am. Jur. 856 and authorities there cited. *Grand International Brotherhood of Locomotive Engineers* v. *Marshall*, Tex. Civ. App. 1938, 119 S. W. 2d 908, wr. ref.; *United Brotherhood of Carpenters and Joiners of America* v. *Carpenters Local Union No. 14*, Tex. Civ. App. 1943, 178 S. W. 2d 558, wr. ref., w. o. m.

State right to work laws have time and again been upheld as constitutional by the United States Supreme Court and such laws cannot be superseded or set aside except by valid constitutional enactments of the Congress. Respondent-unions assume the position that whether a man must join a union as a condition of railroad employment is a matter of *policy* to be settled by Congress, and, therefore, is beyond the province of the court. The petitioners take the position that compulsory unionism is a matter of Congressional policy if—and only if—the union shop statute is judicially determined to be within the *power* of Congress. Petitioners contend that whether a statutory step is within the *power* of Congress is purely a judicial question and that this case questions the *power* of Congress to enact the union shop statute. I agree with the contention of petitioners. I cannot conceive of the United States Supreme Court holding that compulsory union membership brought into being by virtue of the 1951 amendment is possible after reading such cases as *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*, and *Thomas* v. *Collins*, 323 U. S. 516, 65 S. Ct. 315, 89 L. Ed. 430, and many others upholding the right of a worker to join a union. The labor unions, through the courts, have successfully maintained their position that the employer did not have the right to deprive the worker of the right to join a union. Now, it would be a sad spectacle, indeed, for the Congress to be permitted to enact a statute which

would have the effect of enabling the union to drive the nonunion employees into the union or out of work.

The record in the present case is the authority for holding that "the other conditions" referred to in the *Hanson* opinion exist, and applying the holding in that case to the facts in the present case, and in view of its holding that governmental action was present in the *Hanson* case, this court should hold that governmental action was taken on behalf of the unions by Congressional action in the enactment of Section 2, Eleventh, and that such action was unlawful and unconstitutional, and in strict violation of petitioners' right under the First and Fifth Amendments. The record in this case shows a design or pattern of procedure on the part of the respondent-unions to require a contract which would better enable the requirement of compulsory union membership, the taking of an oath that would indicate the subject was acting and speaking of his own free will, when, in fact, he is acting and speaking against his will and only on compulsion, and would ultimately lead to a destruction of his freedom of choice and freedom of conscience.

The judgment of the Court of Civil Appeals and the trial court should be modified, and, as modified, the injunction granted by the trial court should be affirmed.

GRIFFIN and MCCALL, *JJ.*, join in this dissent.

SUPREME COURT OF TEXAS.

JUDGMENT.

No. A-5061.

M. E. Sandsberry et al. and Gulf, Colorado & Santa Fe Railway Co. et al.

vs.

International Association of Machinists et al.

July 25, 1956.

From Potter County Seventh District.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Seventh Supreme Judicial District, and the original transcript as well as the transcript showing the proceedings had in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was no error in the judgment of the Court of Civil Appeals, as follows:

"This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be reversed and judgment be here now entered as should have been entered in the Court below.

"It is accordingly ordered, adjudged and decreed that the appellees, M. E. Sandsberry, Jr., D. B. Barker, C. D. Pratt, Louise J. Seelig, R. L. Lovelady, S. E. Dubose, O. E. Elliott, A. V. King, K. A. Yarbrough, Mary R. White, Barbara L. Eubanks, Mrs. Elaine S. Williams and M. F. Fisher and the Gulf, Colorado & Santa Fe Railway Company, Panhandle and Santa Fe Railway Company and the Atchison, Topeka and Santa Fe Railway Company, take nothing by reason of their

> suit against the appellants and the appellants go hence without delay and recover their costs.
>
> "It is further ordered, adjudged and decreed that the injunction heretofore issued by the trial court against the appellants be and the same is here dissolved and held for naught.
>
> "It is further ordered, adjudged and decreed that the appellees pay all costs in this behalf expended for which let execution issue and this decision be certified below for observance."

it is therefore *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and is hereby, in all things affirmed.

It is further ordered that the petitioners, M. E. Sandsberry, Jr., D. B. Barker, C. D. Pratt, Louise J. Seelig, R. L. Lovelady, S. E. Dubose, O. E. Elliott, A. V. King, K. A. Yarbrough, Mary R. White, Barbara L. Eubanks, Mrs. Elaine S. Williams, M. F. Fisher, the Gulf, Colorado & Santa Fe Railway Company, Panhandle and Santa Fe Railway Company and the Atchison, Topeka and Santa Fe Railway Company, pay all costs in this behalf incurred and expended in this Court, the Court of Civil Appeals and District Court, and that this decision be certified to the District Court of Potter County, Texas, for observance.

OPINION OF COURT OF CIVIL APPEALS OF TEXAS.

Amarillo, November 15, 1954.

No. 6437.

International Association of Machinists, *et al.*,
Appellants,

vs.

M. E. Sandsberry, Jr. *et al.* and Gulf, Colorado & Santa Fe Railway Company, *et al.*,
Appellees.

This cause of action involves the constitutionality of Title 45, U. S. C., Section 152, Eleventh. The provisions of the Act essential to a determination of this appeal are as follows:

> "Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> > (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; * * *

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

Sections Fourth and Fifth provide in essence that "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; * * *."

It is readily apparent that if Section 152, Eleventh is unconstitutional, it does not effect a repeal or amendment of said Sections Fourth and Fifth. Therefore, such sections of the Act prohibiting a carrier from requiring its employees to sign any contract or agreement promising to join or not to join a labor organization would be in full force and effect. It would necessarily follow that an injunction would issue to prevent the appellants from violating the rights assured to non-union employees by such Act of Congress. It would also necessarily follow that if Section 152, Eleventh is a valid exercise of the commerce power within the limits of the Constitution, that such an injunction should not issue. These considerations define the issue on appeal. Counsel for appellants repeatedly refers to the issue in this cause as one involving "union security". Only a casual survey of the acts of Congress and of the pertinent decisions of the Supreme Court of the United States on this issue should wholly dispel any fear entertained by appellants' attorney as to loss of "union security". The ultimate issue in this cause of action is whether the unions under the provisions of Section 152, Eleventh, by collective bargaining, may require the execution of a closed shop contract between the unions and the Santa Fe—which contract will require the discharge of all non-union employees who do not join and remain members of the union.

It is apparent from the record, as found by the jury,

that the unions following the enactment of Section 152, Eleventh, unless restrained by injunction, were about to resort to economic force upon the Santa Fe for the purpose of compelling it to sign a union shop agreement. Such a contract would require Gulf, Colorado & Santa Fe Railway Company and the other appellee railroads, hereinafter referred to as Santa Fe, to discharge all non-union employees who did not join and remain members of a union. The appellees in this cause, other than the Santa Fe, are twelve employees of the Santa Fe who, acting for themselves and on behalf of all other employees similarly situated, brought a suit in the trial court to restrain the Santa Fe and the sixteen nonoperating railway unions from entering into such closed shop agreement. They also sought to restrain the Unions from striking or using other economic force to compel the Santa Fe to enter into such contract. These twelve non-union employees of the Santa Fe will be referred to herein as Plaintiffs. Although named as a defendant in the suit, the Santa Fe joined the Plaintiffs in seeking relief against the defendant Unions, appellants in the cause and designated herein as the Unions.

The case was tried before a jury and all findings of fact by the jury, other than the answers to Special Issues Nos. 7(a) and 12(c), are supported by sufficient evidence in the record. Under the jury's finding in answer to Issue No. 7 that a union shop agreement would not substantially interfere with the Santa Fe's procuring of desirable new employees, it necessarily follows as to Issue No. 7(a) that the Santa Fe would not, in reasonable probability, suffer irreparable injury by the signing of the union shop agreement—which fact is contrary to the jury finding that the Santa Fe would suffer irreparable injury by the signing of the agreement. There is no evidence of probative force that a strike would result in irreparable injury to the public as found under Issue No. 12(c). The jury findings

support appellees' contention as to facts proven in the trial of the cause. However, the fact findings of the jury are not controlling in the cause as the appeal is determined by the application of established principles of law.

After the return of the jury verdict in the cause, the trial court ruled upon the issues briefly outlined above and entered a declaratory judgment that Section 152, Eleventh, was unconstitutional and void because the same violated the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States. The trial court also ruled that the above Congressional Act had no substantial relationship to interstate commerce under the provisions of Clause 3, Section 8, of Article 1 of the Constitution of the United States. Following such action, the trial court found that the issue in the cause was governed by Article 5207A, Vernon's Texas Civil Statutes, generally known as the Texas "Right-To-Work" statute. The court issued a very comprehensive permanent injunction against the Unions which in essence restrained them from entering into a closed shop agreement with the Santa Fe and from striking or using other action to enforce the execution of such an agreement. The Unions appealed from this judgment of the trial court. Appellees' brief is presented on behalf of the Santa Fe and the Plaintiffs.

This appeal may be resolved by a correct application of the principles of law governing the rulings of the trial court as outlined above. This will also effect a final ruling on the various issues raised under appellants' points of error and appellees' counter-points.

Appellant Unions' Point 1-A asserts that the trial court erred in ruling that Section 152, Eleventh, was an invalid exercise of the commerce power. Section 152, Eleventh, is a valid exercise of the commerce power as established by numerous decisions of the Supreme Court of the United States. *Texas & New Orleans Railroad Company, et al.,*

Petitioners v. *Brotherhood of Railway & Steamship Clerks, et al.*, 281 U. S. 548, headnotes 11, 12 and 13; *Virginian Railway Company, Petitioner* v. *System Federation No. 40, Railway Employees Department of the American Federation of Labor, etc., et al.*, 300 U. S. 515, headnotes 8, 9 and 10; *Brotherhood of Railroad Shop Crafts of America, Rock Island System, Grand Lodge No. 3, et al.* v. *Lowden, et al.*, 86 F. 2d 458; *United States of America, Appellant* v. *Carolene Products Company*, 304 U. S. 144, headnotes 1, 2, 3, 4, and 5.

Appellant Unions by Point 1-B and C assert that the trial court erred in ruling that Section 152, Eleventh, was void in that it violated the First, Fifth, Ninth and Tenth Amendments to the Federal Constitution. The controlling principle as to this issue is presented in appellees' brief, "It is well settled that the first ten Amendments to the Constitution are a check only on the activity of Congress and are not limitations on purely private action. *Corrigan* v. *Buckley*, 271 U. S. 323, 330 (1926). • • • In this case, therefore, decision of the constitutional questions raised under the First, Fifth, Ninth and Tenth Amendments requires, as a condition precedent, that 'governmental action' be found." The issue as to "governmental action" is best expressed by the further statement found in appellees' brief: "The condition is satisfied by a showing that private parties have been aided 'in some way' by 'government's thumb on the scales.' " The record has been examined with care as to the issue of governmental action as defined above. This Court can only rule on the expressions of Congress as incorporated in its various legislative acts and the Court is bound by the rulings of the Supreme Court of the United States interpreting such acts of Congress. An examination of the Congressional Act here in issue in the light of many rulings by the Supreme Court of the United States precludes a finding

that governmental action was taken on behalf of the unions by congressional enactment of Section 152, Eleventh. Section 152, Eleventh is not in contravention of the First, Fifth, Ninth and Tenth Amendments to the Constitution. *Otten* v. *Baltimore & O. R. Co., et al.*, 205 F. 2d 58; *Irene Hand Corrigan and Helen Curtis, Otherwise Known as Mrs. A. L. Curtis, appts.*, v. *John J. Buckley*, 271 U. S. 323; *R. R. Grovery, Petitioner* v. *Albert Townsend*, 295 U. S. 45; *American Communications Association, C. I. O., et al.* v. *Charles T. Douds, Individually and as Regional Director of the National Labor Relations Board, Second Region—United Steelworkers of America, et al.* v. *National Labor Relations Board*, 339 U. S. 382 at 402; *National Federation of Railway Workers* v. *National Mediation Board, et al.*, 110 F. 2d 529, Syl. 17-19; *Courant* v. *International Photographers of Motion Picture Industry Local 659, et al.*, 176 F. 2d 1000, Key 2; *Virginian Railway Company, petitioner* v. *System Federation No. 40 etc., supra; American Federation of Labor, Arizona State Federation of Labor, et al.* v. *American Sash & Door Company, et al.*, 335 U. S. 538, 550.

Section 152, Eleventh, does not contravene the prescription against involuntary servitude as set forth in the Thirteenth Amendment to the Constitution of the United States. As pointed out hereinabove, no governmental action is involved as to the execution of a closed shop contract between the unions and the Santa Fe. Under the Congressional Act, as revealed by its language, it is *permissive* for the Santa Fe and the Unions to execute a closed shop contract. (Emphasis added.) The ultimate execution of the contract as to a closed shop is thus left subject to collective bargaining between the Unions and the Santa Fe. On the issue as to a closed shop, it must be observed that prior to the enactment of Article 5207A, Vernon's Texas Civil Statutes, *supra*, it was expressly

decreed by the courts of Texas that an employer and union contract as to a closed shop was not void as against public policy. It does not appear that such decisions have been ruled invalid as contrary to the Thirteenth Amendment of the Federal Constitution. *Underwood, et al.* v. *Texas & P. Ry. Co., et al.*, 178 S. W. 38; *Harper, et al.* v. *Local Union No. 520, International Brotherhood of Electrical Workers, et al.*, 48 S. W. 2d 1033; *San Angelo* v. *Amalgamated Meat Cutters & Butchers Workmen of North America, Local 103*, 139 S. W. 2d 843.

The rulings hereinabove made bring in issue a further principle of law governing this cause of action. Section 152, Eleventh, permits the making of a closed shop agreement "Notwithstanding any other provisions of this chapter or of any other statute or law of the United States, or Territory thereof, or of any State, * * *." As Section 152, Eleventh is a valid exercise of the commerce power in regulating labor relations between the Unions and the Santa Fe operating in interstate commerce, the amendment is valid and controlling in this field and supersedes any state legislation in the same field and contrary thereto, to-wit: Article 5207A, Section 1, *supra* and Art. 7428-1, Vernon's Texas Civil Statutes. *New York Central Railroad Company, Plff. in Err.* v. *James Winfield*, 244 U. S. 147; *Wichita Falls & Southern R. Co.* v. *Lodge No. 1476, International Ass'n of Machinists, et al.*, 266 S. W. 2d 265, Syl. 6 (error refused—no reversible error); *Brotherhood of Railroad Trainmen, et al.* v. *Owens, et al.*, 165 S. W. 2d 128; *Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local 941* v. *Whitfield Transportation, Inc.*, Vol. 23, Texas Supreme Court Reporter, Page 390, No. A-4247.

One other issue must be discussed as the same is essential to a correct disposition of the appeal. It is a recognized principle and appellees concede in their brief that "Union leaders have argued and the courts have quite

properly held that it is a 'fundamental' right of man to organize and bargain collectively with their employer—a right which exists separately and apart from legislation." (Citing authorities.) Therefore, since collective bargaining is not only a fundamental right but is one also permitted by congressional enactment—Section 152, Eleventh, the Unions and Santa Fe may not be enjoined from the exercise of such valid and legal right of collective bargaining. Nor can the Unions be enjoined from striking to procure their asserted rights which are subject to collective bargaining. This is an established principle of law under the theory of collective bargaining even though, as found by the jury in answer to Issue 12(b), such a strike would result in irreparable injury to the Santa Fe. If the right of collective bargaining be conceded, which right is established beyond controversy and is conceded by appellees, it follows logically that the essential moving force behind effective bargaining is the ever present and imminent threat of irreparable injury to one of the bargaining parties. To enjoin collective bargaining under the theory that it threatens irreparable injury to one or more of the parties concerned is to wholly destroy the right of collective bargaining. *Harper, et al.* v. *Local Union No. 520, International Brotherhood of Electrical Workers, et al., supra*, Syl. 5 and 6; *Cline* v. *Insurance Exchange of Houston*, 154 S. W. 2d 491, Syl. 4-12; affirmed 166 S. W. 2d 677.

Under the principles discussed hereinabove, appellants' Point 1, Sections A, B, C and D, and Points 3, 7 and 8 must be sustained. Appellants' Points 2-A and B, 4, 5 and 6 are overruled as such issues become immaterial under the above rulings.

The judgment of the trial court is reversed and judgment is rendered for appellants. The injunction granted by the trial court is dissolved.

HERBERT C. MARTIN,
A. J.

DISTRICT COURT OPINION.

M. E. Sandsberry, Jr., *et al.*
vs.
Gulf, Colorado and Santa Fe Railway Company, *et al.*

In the 108th District Court of Potter County, Texas. February 6, 1954.

MEMORANDUM DECISION.

Adding together the time that has been consumed in successive hearings, this case has occupied the almost exclusive attention of the Court for some five weeks. We have heard the positions of the parties stated, we have read the pleadings of the parties and have heard them read by the parties themselves. The Court and the jury have attentively listened to witnesses from far and near, all that the parties have chosen to offer, and, in order that we might be sure that all sides should have full opportunity to be heard, we have allowed a rather wide scope to the evidence, wider, perhaps, than the strict rules of evidence would have required; but in so doing, we have accorded the same leniency to all parties. The jury has returned its verdict, making findings of fact in accordance with the issues submitted to them. We have listened, on repeated occasions, to counsel as they have presented to the Court their views of the law and have undertaken to support their views by the citation of Constitutional and statutory provisions and by judicial decisions. The entire course of repeated judicial hearings having been followed down to this point, the time has now arrived for the decision of the Court to be announced and for the judgment to be entered of record.

There are many parties to this lawsuit, but they fall into three groups. First, there are thirteen individual plaintiffs, employees of the Santa Fe, who appear in this case

representing themselves individually and others who, for the purposes of this suit, are in position similar to themselves; second, there are three railroad companies, together constituting what is known as the Santa Fe System; and, third, there is a group of what is referred to as non-operating railroad labor unions. While, in their outermost reaches, the issues become many and complex, reduced into proper compass they may be simply stated. The unions are engaged in a process of trying to procure with the Santa Fe what is commonly known as a union shop agreement. Such an agreement, if entered into, would require the Santa Fe, within a short period of time, to discharge the plaintiffs from its employ unless the plaintiffs joined the union appropriate to the positions held by them. The plaintiffs are employees of the Santa Fe who do not want the Santa Fe and the unions to enter into such an agreement. Many of them have worked for the Santa Fe for long years. They do not want to be forced to join a union, and they do not want to be discharged from their positions for failure to join a union. The Santa Fe, though a defendant in so far as the original suit of the plaintiffs is concerned, has stated that the plaintiffs are among its trusted and valued employees, that it desires to retain their services, and that it does not want to sign an agreement with the unions that will require it to discharge the plaintiffs if they do not join a union. Both the plaintiffs and the Santa Fe allege that the unions have threatened to use coercive measures, including the calling of a strike, if such an agreement is not signed, and they seek the issuance of an injunction to prohibit the use of such coercive measures. Shall this Court grant such relief? Thus, the question for determination is stated in its simplest form.

Our first inquiry, we think, would properly be, When is a Texas Court authorized to grant an injunction? Our Texas statutes authorize the district and county courts of

Texas to grant injunctions in specified cases, among which are these:

> "1. Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.
>
> "2. Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.
>
> "3. Where * * * irreparable injury to * * * personal property is threatened, irrespective of any legal remedy at law." (Revised Statutes of Texas, Art. 4642.)

At this point, we think it appropriate to state that to the most casual lay observer it must be apparent that the verdict of the jury is favorable to the plaintiffs and to the Santa Fe and unfavorable to the unions. Only two of the total of 26 questions submitted to the jury may be construed as favoring the unions. These are Special Issue No. 1 (d), which in its simple form is a finding that the unions have made every reasonable effort to settle the union shop controversy with the Santa Fe by collective bargaining. In answer to Special Issue No. 1 (c) the jury likewise found that the Santa Fe has made every reasonable effort to settle the union shop controversy with the unions by collective bargaining. These two findings are consonant with the finding in response to Special Issue No. 1 (e) to the effect that at the end of the Chicago meeting a deadlock existed, with the union representatives refusing to amend or change the terms and provisions of the proposed agreement and the Santa Fe refusing to sign said agreement as presented to it, all of which findings are tantamount to a finding that nothing more could be accomplished by collective bargaining and that further bargaining on the question of a union shop was useless.

The only other finding of the jury that can be said to

favor the position of the unions is the finding in response to Special Issue No. 7, wherein the jury found that the signing of a union shop agreement would not substantially interfere with the procuring of desirable new employees by the Santa Fe. It is to be observed that the jury did find, in effect, that the signing of a union shop agreement would work irreparable injury to the Santa Fe in other ways (Special Issue 7-A), and that it would result in irreparable injury to the plaintiffs (Special Issue No. 11).

During the consideration of this case many Constitutional and statutory provisions have been referred to. Among the statutory provisions is an Act of Congress commonly called the Railway Labor Act and an act of the Texas Legislature commonly called the Texas Right to Work Law (Revised Statutes of Texas, Art. 5207a). Several provisions of the Constitution of the United States have been invoked, including what is referred to as the Commerce Clause, which gives to Congress the right to regulate interstate commerce. Thus we are faced with the problem of relating these Constitutional and statutory provisions to each other, with the problem of determining whether any of them are in conflict with others of them, and, if so, of resolving the conflict so as to determine which of them are controlling. These problems arise out of the complex form of our government, a sovereign federation of sovereign states. Such questions would not arise in a unitary state, such as, for example, in the Republic of France. To resolve them, we must keep this complex character of our government in mind. The fact is that we have at least 49 governments, the Government of the United States and the government of each of the States, each sovereign in its own proper sphere. This is further complicated by the fact that there are some spheres of legislation in which either the State or the Federal Government may legislate. Then the power of each of the State Legis-

latures is limited by the Constitution of that State, and the powers of the State Legislatures and of Congress are limited by the Constitution of the United States. It should be remembered in this connection that, under our theory of government the final source of all power is the people themselves. The people of the United States, by that great document known as the Constitution of the United States, have given to the Federal Government certain defined powers, and all powers not so delegated are reserved to the people or to the several States. When a State Government enacts a piece of legislation and the United States government enacts other legislation, and there appears to be a conflict between the two, our first problem is to determine whether such apparent conflict does in fact exist. This statement has particular application to the Texas Right to Work Statute and to Section 2, Eleventh, of the Railway Labor Act. This brings up the question as to whether said Section 2, Eleventh, is merely permissive or is mandatory. If it is merely permissive, then, in our opinion, it should not be held to be in conflict with the Texas statute. If it is to be considered mandatory, then we must determine whether it is constitutional.

It has been claimed that the Federal Act is constitutional under the Commerce Clause of the Constitution which gives Congress the right to regulate commerce between the several States. Congress undoubtedly does have the right to regulate commerce between the States, but that does not mean that Congress has the right to regulate matters that have no essential relation to interstate commerce. Where the relation of the matter to interstate commerce is incidental and not vital, the field is open to State legislative action. Such, we believe, are the matters involved in this litigation. Whether employees of the Santa Fe are union members or not, is not a matter vital to the carrying on of commerce between the several States. Whether the em-

ployees of the Santa Fe are members of unions or not, is not a test of their ability to discharge their duties as employees and has no essential relation to their duties in connection with interstate commerce. Hence, we are of the opinion that under the Commerce Clause of the Constitution, Congress has no right to enact legislation making union membership a test of the right to work for a carrier engaged in interstate commerce.

It has been said, and truly so, at least to an extent, that a presumption of constitutionality should be indulged in favor of an Act of Congress. Generally speaking, an Act of Congress should be considered as valid until it has been held otherwise; but that does not mean that its validity cannot be questioned, and the determination of that issue seems to be here involved. If it is, we cannot answer the question on the basis of a presumption. Otherwise, no Act of Congress could ever be questioned. It is certainly not a conclusive presumption. Many Acts of Congress under which our people have been governed for varying periods of time have been held invalid, when the matter came up squarely for decision. The well-known N. R. A. is simply one among many others.

It has been suggested that we have merely a matter of policy involved, and that matters of policy are determined by our legislative bodies, that is, in national matters, by Congress. There is a question as to whether it is merely a matter of policy that is here involved, but if it is a matter of policy, Congress has no power to establish any policy the effect of which is to bring about a violation of Constitutional guaranties. And this is true regardless of the majority in Congress by which the legislation may have been enacted. Otherwise, Congress would have the power to repeal the Constitution, if an act were passed by a sufficient majority.

Coming down to the heart of the case, laying all collateral

considerations aside, it is the opinion of this Court that the making and enforcing of a union shop agreement such as is proposed by the defendants in this case, will naturally and inevitably result in depriving the plaintiffs and the Santa Fe of rights guaranteed to them under the Constitution of the United States and will result in irreparable injury to them, as found by the jury in this case. We find that among the rights that would be so denied to said parties are rights set out and guaranteed under the First, Fifth, Ninth, Tenth, and Thirteenth Amendments to the Constitution of the United States.

Over and beyond any express constitutional provisions, we are of the opinion that the making and enforcing of a union shop agreement such as that proposed by the defendants would violate an essential and inherent right of man, regardless of any constitutional provision. The genius and the spirit of our country is based on the worth and essential value of individual human personality. The thought is expressed in our Declaration of Independence, and, although it may not find literal expression in our Constitution, its spirit is breathed into and permeates every part of that grand document. I refer to the words where the founders of our great nation declared:

> "We hold these truths to be self-evident: that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."

In our opinion, it cannot be successfully denied that that which denies a person the right to work at any of the ordinary vocations of life that he may choose to work at, or that he may be fitted for, effectively denies to him his liberty, the pursuit of happiness, and the means of obtaining a livelihood, which is to say, life itself.

An English poet, no longer well remembered, penned these lines:

"Stone walls do not a prison make,
Nor iron bars a cage;
Minds innocent and quiet take
That for an hermitage;
If I have freedom in my love
And in my soul am free,
Angels alone, that soar above,
Enjoy such liberty."

The imprisonment of a man's body is a terrible thing, for it is instinctive in man to love freedom; but the imprisonment of man's body is of minor importance to the imprisonment of his spirit and his will. John Bunyan's body was for many years imprisoned in the Bedford jail, but his spirit and his will were free to roam heaven and earth and to achieve immortality. When man's spirit, his will, his freedom of choice in lawful matters, are taken away from him, he becomes a slave indeed.

Reference has been made to the provisions that physicians and lawyers automatically become members of the medical association and of the bar association, which have been referred to as "closed shops." In this connection it has never been held, so far as is known to this Court, that any man has a legal right to practice medicine or law. These professions have been held to be on a different status from the common vocations of life, and to engage in such a profession one must earn not a right, but a privilege, which the State can withdraw the same as it granted it.

It has been suggested that ours is a great democracy in which the majority rules and ought to rule. It is also true that it is a land governed by laws, and not by men; and when the law has been properly fixed and determined, then it is the law, and not men, that govern. This idea has been rather aptly expressed in the saying that one man with the law on his side is a majority.

It is the opinion of the Court that the plaintiffs and the

Santa Fe have shown themselves entitled to the injunction, and it will be granted. We shall not at this time undertake to outline the order or to define its exact content. This will come in the order itself when there has been time to prepare it. We may state that the effect of it, in the main, will be to forbid the parties from entering into a union shop agreement and will forbid the unions, their members, officers, agents, and anybody acting for them or in their behalf, from bringing any coercive measures on the Santa Fe for the purpose of effecting a union shop agreement.

This must not be in any manner considered as an assault on labor unions. Regardless of how they may have been considered in the past, they are now a recognized part of our industrial and economic life. They are recognized as necessary and proper in our present-day economy. The purpose and effect of this injunction will be only to prevent the unions from doing what, in the opinion of the Court, they have no legal right to do. It is not directed at unionism, but only at compulsory unionism. It is a part of our American heritage that, so long as an individual does not violate the law or infringe upon the rights of others, he has the right to do as he pleases. The principle of compulsion in matters that rightfully lie in the field of human volition, is repugnant to the idea of individual human worth and to man's freedom of choice. There have been, in the past, many organizations that have tried to compel membership in them by penalizing those who did not become members. This has been true of political parties, of industrial and business organizations, and even of the Church. There was a time when, if a man did not belong to the established church, he was deprived of his political rights. That time has passed. Man must be free to exercise his own choice as to whether he will or will not belong to a private organization, and to require his membership as a condition of his right to work is repugnant to American concepts of individual freedom.

There is a saying that a good rule should work both ways. It is expressed in homely language by the old saying "Put the shoe on the other foot." These are but other ways of expressing the Golden Rule. It should be fair for us to test the matter before us by reversing the situation of the parties, in other words "by putting the shoe on the other foot." Let us suppose, for example, that the Santa Fe was threatening to discharge all of its employees who belonged to a union. Let us suppose, as would surely be the case, that many of those employees had worked for the Santa Fe for many years and had built up valuable seniority. Let us suppose, as would surely be the case, that many of them had worked for the Santa Fe all, or practically all, of their working lives, that by reason of their long service for the Santa Fe they had failed to acquire skills that would fit them for profitable employment in other trades, industries, or business; let us suppose that for the latter reason and because of their age they could not now obtain profitable employment elsewhere; and let us suppose, further, that they were competent and loyal employees and that the only reason the Santa Fe had for discharging them was the fact that they belonged to a union. In such a situation, can it be doubted that they would come to a court of equity seeking an injunction to prevent their wrongful and arbitrary discharge? We think not. And, in such situation, would not the labor unions make common cause with them and join with them in their suit to prevent their discharge? We think so. And with such a showing, would not a court of equity grant the relief sought? Certainly so. If a court of equity ought to grant relief in that situation, it should just as surely grant the plaintiffs and the Santa Fe the relief they here seek. The evidence indicates there was a period of union busting and head busting and of "yellow dog" contracts. That was wrong, but that time, thank God, has passed. And it is just as wrong now that the unions should endeavor to compel men and women to join a union

at the price of holding their jobs. The right answer is that they must be free to join or not to join, as they as individual persons choose to do.

In conclusion, let it be understood that the injunction to be issued will not be designed or intended to prevent any legitimate union activities, including collective bargaining on any lawful subject.

The formal order will be entered as soon as it can be prepared.

E. C. NELSON,
Presiding Judge.

APPENDIX C.

SPECIAL ISSUES AND JURY'S RESPONSES.

SPECIAL ISSUE No. 1.

(a) Do you find from the preponderance of the evidence that at a meeting between the representatives of the defendant labor unions and the representatives of the Santa Fe Railway Company, held in Chicago, on or about May 5, 1953, the representatives of the labor unions demanded that the Santa Fe execute with them a union shop agreement containing the terms and provisions set forth in Plaintiffs' Exhibit 1, admitted in evidence in this case?

Answer "Yes" or "No." (Answer was "Yes.")

(b) If you have answered part (a) of this special issue "Yes," then do you find from the preponderance of the evidence that the representatives of the defendant unions stated that they would not amend or change the terms and provisions of said proposed agreement?

Answer "Yes" or "No." (Answer was "Yes.")

(c) Do you find from the preponderance of the evidence that the Santa Fe has made every reasonable effort to settle the union shop controversy with the unions by collective bargaining?

Answer "Yes" or "No." (Answer was "Yes.")

(d) Do you find from the preponderance of the evidence that the unions have not made every reasonable effort to settle the union shop controversy with the Santa Fe by collective bargaining?

Answer: "We find the unions have not made such effort," or "We do not so find." (Answer was "We do not so find.")

(e) Do you find from the preponderance of the evidence that by the end of the Chicago meeting of May 5, 1953, a deadlock existed with the union representatives refusing to amend or change the terms and provisions of the proposed agreement and the Santa Fe refusing to sign said agreement as presented to it?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 2.

(a) If you have answered part (a) of Special Issue No. 1 "Yes," then do you find from the preponderance of the evidence that the representatives of the defendant unions threatened to use economic force to require the Santa Fe Railway Company to sign the agreement then presented to them?

Answer "Yes" or "No." (Answer was "Yes.")

If you have answered part (a) of this Special Issue "Yes," then answer the following:

(b) Do you find from the preponderance of the evidence that by making such threat, if any, the representatives of the unions meant for the representatives of the Santa Fe to believe that unless such contract was signed, the unions would call a strike on the Santa Fe Railway System or some part of it?

Answer "Yes" or "No." (Answer was "Yes.")

(c) Do you find from the preponderance of the evidence that at the Chicago meeting the Santa Fe had reasonable grounds for believing and did believe that the unions would call a strike if a union shop agreement was not signed?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 3.

Do you find from the preponderance of the evidence that at the Chicago meeting it was the intention of the unions to call a strike if the Santa Fe did not sign a union shop agreement?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 4.

Do you find from the preponderance of the evidence that following the Chicago meeting held on or about May 5, 1953, it was reasonably probable that the defendant unions would have called a strike on the Santa Fe Railway System, or on one or more component parts thereof, if the Santa Fe had not signed, or agreed to sign, a union shop agreement?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 5.

Do you find from the preponderance of the evidence that the Santa Fe now has in its employ a substantial number of non-operating employees who, in the exercise of their own choice, are not members of any of the defendant unions?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 6.

(a) Do you find from the preponderance of the evidence that the Santa Fe now has in its employ a substantial number of non-operating employees who are opposed to being required to join a union as a condition of their continued employment?

Answer "Yes" or "No." (Answer was "Yes.")

(b) If you have answered part (a) of this Special Issue "Yes", then do you find from the preponderance of the evidence that the plaintiffs, all or some of them, are included in the group referred to?

Answer "Yes" or "No." (Answer was "Yes.")

(c) If you have answered part (a) of this Special Issue "Yes", then do you find from the preponderance of the evidence that the signing of a union shop agreement by the Santa Fe would, in reasonable probability, cause it to lose a substantial number of employees who desire to retain their employment and whose services the Santa Fe desires to retain?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 7.

Do you find from the preponderance of the evidence that the signing of a union shop agreement would substantially interfere with the procuring of desirable new employees by the Santa Fe Railway Company?

Answer "Yes" or "No." (Answer was "No.")

SPECIAL ISSUE No. 7-A.

Do you find from the preponderance of the evidence that the Santa Fe will in reasonable probability suffer irreparable injury if a union shop agreement is signed?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 8.

Do you find from the preponderance of the evidence that on or about May 5, 1953, the plaintiffs or some of them had a reasonable cause to fear, and did fear, that unless restrained by injunction, the defendant unions would resort

to economic force upon the Santa Fe for the purpose of compelling it to sign a union shop agreement?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 9.

Do you find from the preponderance of the evidence that on or about May 5, 1953, the plaintiffs or some of them had reason to fear, and did fear, that, unless restrained by injunction, the Santa Fe Railway Company would either voluntarily or involuntarily sign a union shop agreement with the defendant unions?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 10.

If an injunction is not issued in this case, do you find from the preponderance of the evidence that it is reasonably probable that the Santa Fe Railway Company will sign a union shop agreement?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 11.

If the Santa Fe Railway Company, on or subsequent to May 5, 1953, either voluntarily or involuntarily, had signed a union shop agreement with the defendant unions, do you find from the preponderance of the evidence that the plaintiffs, or some of them, as a result thereof, would have suffered or would suffer irreparable injury?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 12.

(a) Do you find from the preponderance of the evidence that a strike of the non-operating unions on the Santa Fe Railway System, or on any of its component parts, would prevent or greatly hinder the normal functioning of the Santa Fe as a common carrier of passengers and merchandise?

Answer "Yes" or "No." (Answer was "Yes.")

(b) If you have answered part (a) of this special issue "Yes", then do you find from the preponderance of the evidence that such a strike would result in irreparable injury to said Santa Fe Railway Company?

Answer "Yes" or "No." (Answer was "Yes.")

(c) If you have answered part (a) of this special issue "Yes", then do you find from the preponderance of the evidence that such a strike would result in irreparable injury to the public?

Answer "Yes" or "No." (Answer was "Yes.")

SPECIAL ISSUE No. 13.

Do you find from the preponderance of the evidence that the signing and enforcement of a union shop agreement is not necessary to the continued existence and well-being of defendant labor unions?

Answer: "We find it is not necessary to their continued existence and well-being", or "We do not so find". (Answer was "We find it is not necessary to their continued existence and well-being".)

SPECIAL ISSUE No. 14.

Do you find from the preponderance of the evidence that the plaintiffs did not bring this suit in good faith?

Answer: "We find plaintiffs did not bring this suit in good faith", or "We do not so find". (Answer was "We do not so find".)

SPECIAL ISSUE No. 15.

Do you find from the preponderance of the evidence that Santa Fe did not bring its suit in good faith?

Answer: "We find that Santa Fe did not bring its suit in good faith", or "We do not so find." (Answer was "We do not so find".)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 810

SANDSBERRY ET AL. and GULF, COLORADO AND SANTA FE RAILWAY ET AL., *Petitioners*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL., *Respondents*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Come now the respondents and pray that the petition filed in this case for a writ of certiorari be denied.

QUESTIONS PRESENTED

1. Whether an action to enjoin the negotiation and execution of a union-shop agreement within the terms of the Railway Labor Act is premature.

2. Whether railroads and unions subject to the Railway Labor Act would invade the constitutional

rights of employees of the railroad, protected by the First, Fifth, and Ninth Amendments, by entering into a union-shop agreement identical in terms with the union-shop agreement which was the subject of *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225.

3. Whether, assuming the action is not premature, section 2, Eleventh of the Railway Labor Act permits a union-shop agreement that requires union membership as a condition of continued employment provided that membership is not denied or terminated for any reason other than the failure to pay uniform dues, initiation fees, and assessments (not including fines and penalties).

4. Was the unanimous decision of this Court in *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225, wrong in sustaining the validity of section 2, Eleventh of the Railway Labor Act and failing to hold that it violated the First, Fifth, and Ninth Amendments to the Constitution?

STATEMENT OF THE CASE

This action was brought in the District Court of Potter County, Texas, by fourteen individuals to enjoin sixteen unions and three railroads from entering into a union-shop agreement pursuant to the terms of the Railway Labor Act. The railroads named as defendants were two subsidiaries of the Atchison, Topeka and Santa Fe by whom the plaintiffs were employed, and the parent railroad itself (hereinafter sometimes referred to collectively as the "Santa Fe"). In its answer and further proceedings the Santa Fe joined with the plaintiffs in seeking to enjoin the unions from seeking a union-shop agreement.

The trial court issued temporary and permanent injunctions, holding section 2, Eleventh of the Railway Labor Act unconstitutional for a great variety of reasons, including a violation of the constitutional proscription of involuntary servitude. On appeal to the Texas Court of Civil Appeals, that Court unanimously reversed. The Supreme Court of Texas granted a Writ of Error. Numerous briefs were filed in that Court, and two sets of oral arguments were heard, one set about a year before the decision of this Court in the *Hanson* case and the other about a month after that decision. That Court finally affirmed the reversal by the Court of Civil Appeals of the orders issued by the trial court, by a vote of six to three.

The exceedingly voluminous record in this case, which petitioners frequently refer to as containing much material not contained in the *Hanson* record and calling for a conclusion opposite to that reached by this Court in the *Hanson* case, was found by the Supreme Court of Texas "to be cumulative and amplified rather than distinctive" from the record before this Court in the *Hanson* case.

Five of the Justices who rejected petitioners' contentions stated that certain conduct with which the unions were charged with respect to other railroads and other individuals would be illegal if engaged in with respect to petitioners. But they found that the contract which the unions had been seeking, and which they were enjoined from continuing to seek, was the same as the contract sustained by this Court in the *Hanson* case. They held that they could not presume that the unions would engage in illegal conduct under a contract which this Court had held legal, but that if the unions should do so then (quoting from the

language of this Court in the *Hanson* case) the judgment in this case would not prejudice the decision in such subsequent case if one should be brought. One Justice concurred but disagreed with the propriety of the majority in interpreting an unexecuted contract which the unions were seeking and defining in advance certain rights of the parties under certain provisions of the contract the unions were seeking, if they should obtain such contract. It was his view "that the foregoing issues are prematurely raised and prematurely decided." Three Justices dissented in two opinions difficult to describe other than by saying that one of the opinions says that section 2, Eleventh is unconstitutional at least insofar as it permits a union-shop agreement requiring membership in the union, even though such provision would not be applicable if membership is denied or terminated for any reason other than the failure to pay uniform dues, initiation fees, and assessments (not including fines and penalties); and that they could not conceive that this Court had held or would hold to the contrary.

ARGUMENT

1. The Action Is Premature

This issue is not presented by petitioners as one of the issues in the case, although it is the principal basis of the majority opinion below and the sole basis of the concurring opinion.

The contract respondents were seeking, and which they were enjoined four years ago from continuing to seek, is identical with the union-shop agreement which was the subject of *Hanson* v. *Railway Employes' Dept.*, 351 U.S. 225. Petitioners argue that if respondents obtain such contract they will engage in conduct not

permitted by its terms or by the Railway Labor Act, and introduced evidence which they say shows that respondents have engaged in such conduct in the past with respect to other people employed by other railroads.*

The opinions in the Supreme Court of Texas are described in the final paragraph of our Statement of the Case. We submit that the opinion concurring with the majority of that Court is clearly the sound view, and that the majority opinion insofar as it holds the situation at too early a stage to enjoin what might speculatively happen in the future if certain other events happen first is also sound. Under either opinion, and in any sound view, it is premature for petitioners to complain of action which respondents might or might not take and which there is no possibility of their taking until other events have first occurred.

2. The Execution of the Union-Shop Agreement Would Not Invade Any Constitutional Rights of Petitioners

The first argument of petitioners discusses certain activities in which respondents are alleged to have engaged and certain expenditures they are alleged to have made. Petitioners do not sue to restrain such conduct. Their argument seems to be that if

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* It is significant that at least one of the employees of another railroad with respect to whom respondents are alleged to have taken illegal action under the union-shop agreement brought suit; the United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit held that the conduct was not illegal, and this Court denied certiorari. *Wicks* v. *Brotherhood of Maintenance of Way Employes,* 121 F. Supp. 454, 231 F. 2d 130, 351 U.S. 946; see also *Otten* v. *Staten Island Rapid Transit Ry.,* 229 F. 2d 919, c.d. 351 U.S. 983.

respondents obtain the agreement they are enjoined from seeking, and if respondents thereafter spend part of their funds for the described purposes, and if petitioner-employees refuse to pay dues for such purposes, and if respondents then on such basis take action against petitioners under the union-shop agreement and if as a consequence petitioners lose their employment, their constitutional rights will have been invaded; they therefore think they have a right to have the seeking of a union-shop agreement enjoined.

It is plain that if respondents enter into a union-shop agreement with the Santa Fe, the execution of such agreement, of itself, will not invade any rights, constitutional or otherwise, of petitioner-employees. The existence of the agreement, with its cautious procedural and substantive safeguards, has been held by this Court in the *Hanson* case to be valid. If, as was held in the *Hanson* case and by the Court below, subsequent conduct should violate the Railway Labor Act or the Constitution or any other rights of any of petitioners, the existence of the agreement or a determination of its validity would not prejudice the determination of the effort of anyone to protect his constitutional or statutory rights.

The specific discussion of petitioners under their first point reveals how far they roam from specific adjudicable issues. One person was asked by a union representative for a contribution for purposes of political education, and was told that everyone was paying it and he had to pay it; another was asked for a contribution and thereupon resigned his membership. There is no statement of the consequences of non-payment. They show that most of the respondents and some other labor organizations jointly publish a

weekly newspaper called "Labor", and that that newspaper sometimes states that it supports certain candidates for political office and supports or is opposed to certain legislation it deems favorable or inimical to the interests of wage earners. They quote from one of the dissenting Justices below that one of the respondents once levied a political assessment against one worker.

With respect to all this, it is sufficient to repeat, as both this Court in the *Hanson* case and the Court below in this case said, that if the union-shop agreement is used as a cover for the imposition of ideological conformity or other improper conditions, neither the decision in the *Hanson* case nor the decision in this case will prejudice the decision in such a case.

3. The Railway Labor Act Permits a Union-Shop Agreement Requiring Membership as a Condition of Continued Employment Within Certain Limitations

Petitioners argue in their second point that this Court's decision in the *Hanson* case requires an affirmance of the injunction because this Court held that a union-shop agreement may not require membership as a condition of continued employment. The fact, of course, is that this Court in the *Hanson* opinion, beginning in the first paragraph and repeatedly thereafter, frequently referred to a requirement of membership. This Court (and the Court below) observed that under the Railway Labor Act, and under the express terms of the contract in the *Hanson* case (and under the contract respondents were seeking until enjoined) the union shop could not be applied to any person to whom membership is refused or whose membership is terminated for any reason

other than the non-payment of uniform dues, initiation fees, and assessments (not including fines and penalties). All petitioners' talk about discipline and control simply ignores this limitation of the statute and the contract itself.

This argument of petitioners was made not only in the Court below, where it was rejected, but was made also in the Supreme Court of Nebraska in the *Hanson* case after remand of that case from this Court. That Court accepted briefs and heard oral argument, and then summarily rejected this strange argument without opinion.

4. The Decision of This Court in the Hanson Case Was Not Predicated on a Misunderstanding and This Case Does Not Call for Its Being Overruled

The remainder of petitioners' argument is directed to the proposition that this Court's decision in the *Hanson* case was wrong because this Court overlooked certain points and was wrong on certain facts. This seems to consist of two principal points.

Petitioners argue that section 2, Eleventh of the Railway Labor Act imposes a tax for private purposes. This argument is nothing short of frivolous, and needs no further answer.

The remainder of this portion of petitioners' argument is directed to this Court's statement that Congress might believe that a union-shop agreement might promote the stability of unions and labor relations

and employment in the railroad industry. They say that this Court made such statement out of ignorance. The reason this is so, they say, is because if Congress had any such belief Congress was wrong, because a jury in Amarillo found that respondents do not need a union shop to promote their stability. We submit that if this Court had been informed that certain persons disagree with Congress on the efficacy or desirability of a union-shop agreement to promote stability of labor relations on the railroads, it would not have affected the decision in the *Hanson* case. In the opinion in that case this Court explicitly recognized (at pp. 233-4) that reasonable people disagree on this question, and held that "the choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one". At page 233; and see concurring opinion at page 239.

CONCLUSION

None of petitioners' arguments indicates any reason why the Santa Fe has any standing to complain of the decision below. None of them indicates why the case is of sufficient importance to warrant the granting of a writ of certiorari, but it may be presumed that if this Court's decision in the *Hanson* case is wrong the railroad industry should know that. But we submit that petitioners' contentions are clearly wrong, if not frivolous, on the merits, and that the conclusion below that the injunction should be dissolved is clearly correct and in accord with every relevant precedent,

including the unanimous decision of this Court less than a year ago.

WHEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 810

M. E. SANDSBERRY, JR., D. B. BARKER, C. D. PRATT, ET AL., AND GULF, COLORADO AND SANTA FE RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, ET AL.,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Believing that respondents have misconceived the questions raised, the issues presented, and the content of the record, petitioners desire to file this Reply.

Although respondents oppose certiorari, this case presents an unusual situation in which both petitioners and respondents actually agree that the court below erred in material particulars. But whereas petitioners' disagreement with the Supreme Court of Texas on decisive issues is open and frank, respondents' disagreement on several

important points is covert but nevertheless unmistakable. For instance, respondents agree only with the single concurring judge in the Supreme Court of Texas on the vitally important question whether more can be required of employee petitioners as a condition of union membership under the Union Shop Statute than payment of initiation fees, dues and assessments. They disagree with the holding of the majority below that the membership which can be required under the Statute is only formal and fictional, can be conditioned on nothing more than money payments, and cannot be made to depend upon the filing of an application for membership or the taking of an oath of allegiance agreeing to abide by the provisions in the unions' constitutions and by-laws. 295 S.W. 2d at 415, 416. Almost equally significant are the errors to be found in respondents' statements at pages 7-8 of their Opposition regarding the nature of their demand which was enjoined by the trial court.

1. Reply to Respondents' Statement of Questions Presented

Respondents have inaccurately stated the questions presented. They say that the first question is whether an action to enjoin the negotiation and execution of a union shop agreement within the terms of the Railway Labor Act is premature. But their contention begs the question, for one of the principal controversies in this case is whether or not respondents' demand, as shown in this record, exceeds the authority of the Union Shop Statute. Consequently, respondents to the contrary notwithstanding, the issue is whether or not a demand which exceeds the statutory authorization, and a strike to enforce such a demand, may be enjoined to prevent what the judge and the jury in the trial court found would cause irreparable injury to all petitioners.

Similarly, respondents state the second question to be whether or not entering into a union shop agreement author-

ized by the Railway Labor Act constitutes a deprivation of the rights of employees in violation of the First, Fifth and Ninth Amendments However, the question actually presented in this case is, as shown by petitioners' Question No. 1, whether Congress can constitutionally make union membership and support a condition of employment where it is shown, as in the record here, that respondents use at least a portion of dues, fees and assessments for political, fraternal and ideological purposes not related to collective bargaining. That question was reserved for decision in *Hanson* and is now squarely presented to this Court.

2. Reply to Respondents' Statement of the Case

Respondents' Statement of the Case is likewise erroneous. On page 3 of their Opposition, they state that petitioners say that the record here calls for a conclusion opposite from *Hanson*. The fact is that petitioners contend that this case presents for decision questions reserved in *Hanson*.

On the same page, respondents also say that the Supreme Court of Texas found that the record in this case is "cumulative and amplified, rather than distinctive." They omit, however, the complete sentence from the majority opinion of that court which reads: "While this record does contain probably more factual data for the most part, it would seem to be cumulative and amplified, rather than distinctive." That court actually held that petitioners' record, as distinguished from that in *Hanson*, shows respondents' practices in requiring the discharge of employees who do not become full union members; the actual operation and binding effect of respondents' constitutions and by-laws enforcing their concepts and ideologies; the disciplinary control they exert over members, respondents' political activities and use of funds for political purposes; and respondents' adamant refusal even to discuss the question of money payments in place of union membership. None of these

facts were shown in *Hanson*. However, the Supreme Court of Texas, after incorrectly attributing to this Court judicial knowledge of the use of union funds for political purposes, erroneously refused to continue in effect the injunction issued by the trial court. It recognized that respondents, at the very time the demands here in question were being made, were using union funds for political purposes.

Also on page 3 of their Opposition, respondents state that while the majority opinion of the court below recognized that respondents' conduct in demanding and enforcing a full union shop on other railroads was illegal, it held that it could not be presumed that they would engage in such illegal conduct on the Santa Fe.

This is not a fair statement of that opinion. The majority below recognized that the union funds demanded in this case would be used for political purposes and it found that respondents' demand here was for full union membership. It could make no other findings because these matters were shown by the undisputed evidence. Respondents have not and cannot deny this. What the Supreme Court of Texas did do with regard to respondents' unlawful demand for dues, fees and assessments to be used in part for political purposes, was to hold that this Court had approved such use in *Hanson*. But as shown on page 14 of the petition for certiorari, that holding was based on a faulty construction of this Court's opinion in *Hanson*, and is one of the principal errors which led the majority of the court below to an erroneous conclusion.

As to respondents' demand for a full union shop, the Texas court held that while this would be illegal under the Union Shop Statute, it would set aside the trial court injunction because the demand had evidently been advanced under "a misconception on the part of the unions." If respondents were under a misconception in demanding full union membership of Santa Fe employees—and the Texas

court says they were—they are still laboring under that misconception. That that is their situation is shown in their Opposition, where, at page 5, they express disagreement with the ruling of the majority below that under the Union Shop Agreement union "membership" can be conditioned on nothing more than payment of union fees.

The Supreme Court of Texas, after recognizing that respondents' demand was for full union membership, apparently dissolved the injunction on the theory that by so doing it would be following *Hanson*. But in this it erred, for in *Hanson* this Court did not rule that a demand for an illegal agreement, backed by a strike threat, could not be enjoined.

On page 4 of their Opposition, respondents refer to the dissenting opinions below by saying that they are "difficult to describe." Actually those opinions, briefly recounted, state that respondents' demand was for full union membership as a condition of employment; that this Court in *Hanson* had limited the authorization of the Union Shop Statute to dues, fees and assessments reasonably related to collective bargaining; that respondents' demand was, therefore, beyond the provisions of the Statute and the injunction against it should be affirmed with a modification that would leave room for a demand for dues, fees and assessments reasonably related to collective bargaining.

3. Reply to Respondents' Contention That This Action Is Premature

Respondents contend that petitioners' action is premature. At page 5 of their Opposition, they state that: ". . . [I]t is premature for petitioners to complain of action which respondents might or might not take and which there is no possibility of their taking until other events have first occurred."

This contention is manifestly erroneous. Petitioners' action is not premature for several reasons.

First, respondents ignore the uncontradicted evidence here which does not merely show what they "might" do, but rather shows what they repeatedly threatened to do by way of calling a strike to enforce their demands for a full union shop, to be followed, when their demand had been met, by discharge of all employees who failed or refused to join the organizations because of one or another objection to compulsory union membership. And respondents' purpose was made even more clear by uncontroverted evidence showing how they had actually forced union shop agreements on the majority of railroad managements and how they had procured the discharge of numerous employees who conscientiously objected to compulsory union membership.

Second, an action to enjoin illegal conduct which would cause irreparable injury to a complaining party is not premature but always timely. All that need be shown is a reasonable fear of irreparable injury. What was shown in this case was a practical certainty of such injury unless injunctive relief were granted. The jury and the trial judge found that both employee petitioners and Santa Fe were threatened with irreparable injury. (See Appendix C to Petition for Certiorari, pages 86-87). These findings were not disturbed by any of the Texas appellate courts. The reversal by the Supreme Court of Texas was not predicated on any absence of threatened irreparable injury but on the view of the court that it was bound by this Court's holding in *Hanson* which it understood to approve the objective of respondents. Consequently, the court below ruled that injunctive relief could not be granted because the objective of the unions was lawful.

Third, this suit is not premature unless it would be premature to enjoin the conscription of an individual into any private association. Would it be premature to enjoin

a threatened imposition of a Congressionally sanctioned requirement of membership in or financial support of the Democratic, Republican, Socialist or Communist Parties as a condition of employment? Could Congress authorize compulsory membership in Americans For Democratic Action, For America, or the Chamber of Commerce of the United States as a condition of employment? Certainly not. How then can it be premature to seek injunctive relief against compulsory membership in or support of a labor organization which is not only partly a collective bargaining agency but also partly an active political organization?

Petitioners sincerely believe that it is a deprivation of constitutional rights to compel by government action membership in any private organization. Even if this Court's decision in *Hanson* should be construed as holding that membership can be compelled in an organization which is a collective bargaining agency and no more, it by no means follows that one can be coerced into membership in a union which is not only a bargaining agent but also a political organization or at least partly a political organization. Such compulsion, we submit, is *per se* unconstitutional and its legality depends not at all on surrounding circumstances or conditions, so that an injunction to guard against forced membership in such an organization would always be timely and never premature.

Fourth, taking the holding of the Supreme Court of Texas that respondents' demand was for full union membership—which demand has now in effect been reasserted—adding its holding that such demand is illegal, and this is a classic case for injunctive relief. One of the basic principles of equity in a case of this nature is that an injunction will be issued to restrain an illegal demand of a labor union and a strike threat to enforce such demand.

4. Reply to Respondents' Contention That Execution of a Union Shop Contract Would Not Invade Petitioners' Constitutional Rights

At pages 5-6 of their Opposition, respondents say that petitioners' "argument seems to be that *if* respondents obtain the agreement they are enjoined from seeking, and *if* respondents thereafter spend part of their funds for the described purpose, and *if* petitioner-employees refuse to pay dues for such purposes, and *if* respondents then on such basis take action against petitioners under the union-shop agreement and *if* as a consequence petitioners lose their employment, their constitutional rights will have been invaded. . . ." (Emphasis supplied). In stating the case in this hypothetical fashion, respondents completely ignore the evidence in the record, the findings of the jury, and the findings of the trial court. There are no "ifs" about these propositions, for they were proved by evidence which respondents did not see fit to controvert.

Respondents attempt to belittle the significance of petitioners' evidence of assessments for political campaigns. Thus, on page 6, they so restate the testimony as to eliminate its plain meaning when they say: "One person was asked by a union representative for a contribution for purposes of political education, and was told that everyone was paying it and he had to pay it. . . . There is no statement of the consequence of non-payment." The actual testimony of the witness was that a demand was made on him for payment of an assessment to be used by the Brotherhood of Railway Clerks in support of one of the candidates in the 1948 Presidential campaign.[1]

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[1] "A. I have a number of objections to it. For one thing the union is political. It has certain political aims and it supports certain political parties. I know that because one of the assessments in the union; this assessment was told to me by the secretary

Respondents attempt to avoid what they must know to be the true significance of this evidence. Whatever the consequences for non-payment, if any, this evidence of demands for political contributions demonstrates beyond cavil that respondents are not only partly collective bargaining agencies but are also, in every sense of the word, partly political organizations. Unions are essentially partly political organizations as well as partly collective bargaining agencies because their political activities are not merely occasional or sporadic but are vital parts of the programs provided in their constitutions and by-laws.

At page 7 of their Opposition, respondents concede that *LABOR* "sometimes . . . supports certain candidates for political office or supports or is opposed to certain legislation it deems favorable or inimical to the interests of wage

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of the union that it was for political education purposes towards the re-election of Harry Truman." (S.F. 505)

"Q. What do you say that she told you that the assessment was for?

"A. For political education and for the re-election of Harry Truman." (S.F. 506)

"Q. Did you pay that assessment?

"A. I did not.

"Q. Why?

"A. Because I hadn't made up my mind yet who I was going to work for.

"Q. Did you tell her that?

"A. I did.

"Q. What did she say?

"A. She says everybody is paying this assessment. You have to pay it.

"Q. That is what she told you?

"A. Right.

"Q. That everybody was paying this assessment and that you had to pay it; is that right?

"A. Right.

"Q. How did you like that?

"A. I did not like it at all." (S.F. 507-508).

earners." It is no exaggeration to state that *LABOR* is not merely "sometimes" a political paper, for a large proportion of its lineage is consistently devoted to political matters—and not merely political matters deemed "favorable or inimical to the interests of wage earners." Copies of *LABOR* are in the record in this case and demonstrate the large and significant extent to which respondents engage in political activities. Respondents offered no testimony in the trial court to deny or qualify this and other evidence of their political activity—although they had ample opportunity to do so. Their failure in this respect cannot be cured by attempts of counsel to gloss it over.

Also on page 7, respondents acknowledge for the first time that the *Hanson* decision will not prejudice litigation involving an attempt to enforce ideological conformity under a union shop agreement. This is just such a case.

In purportedly referring to *Hanson*, respondents say ". . . [I]f the union-shop agreement is used for a cover for the imposition of ideological conformity or other improper conditions neither the decision in the *Hanson* case nor the decision in this case will prejudice the decision in such a case." Actually, this Court in *Hanson* at the place referred to was concerned with imposition of dues for such purposes, as shown by the following quotation:

> "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." 351 U.S. at 238.

We submit that by this slight transposition of language respondents have warped *Hanson* to approve a union shop agreement calling for union membership, as dintinguished from a requirement of no more than payment of dues, fees and assessments.

5. Reply to Respondents' Contention That the Railway Labor Act, Within Certain Limitations, Permits Imposition of Union Membership as a Condition of Continued Employment

At page 7 of their Opposition, respondents make it clear that in their minds union "membership" under the Union Shop Statute is not to be limited to payment of initiation fees, dues and assessments. Rather, their position is that "membership" encompasses all of the duties and obligations customarily involved in full membership, subject only to the two conditions spelled out in the Statute, that is, that lack of membership shall not be a ground for discharge from employment where membership is not available or is denied or terminated for any reason other than non-payment of dues, fees or assessments. Respondents' contention is that in *Hanson* this Court ruled that membership is not to be merely a formal matter limited to money payments. Necessarily also, they argue that the majority of the Supreme Court of Texas erred in ruling that under the Union Shop Statute the membership requirements are "merely formal and fictional aside from the financial obligation," and that "The unwilling employee need assume no pledge of obedience, nor even make application for membership. . . ." 295 S.W. 2d at 415, 416.

Petitioners cannot overemphasize the significance of these contentions of respondents. The position they now advance, harking back to their old demand for a full union shop, demonstrates more clearly than anything else the necessity for review by this Court of the decision herein by the Supreme Court of Texas. The court below read *Hanson* as construing the Union Shop Statute to authorize only formal or fictional union membership as a condition of employment—membership which involves no more than payment of regular union fees. Petitioners also understand that that was the holding in *Hanson*. But now respondents not only say that petitioners are wrong but that the majority of the Supreme Court of Texas was also wrong.

They contend, as stated above, that this Court ruled in *Hanson* that under the Union Shop Statute union "membership" can be required as a condition of continued employment and that such membership is not to be limited to money payments. Precisely what other conditions of membership can be imposed are not spelled out by respondents. On this score they seem purposely vague and indefinite, as if they wish to avoid committing themselves at this time before this Court to the conditions of membership other than money payments, if any, which may be imposed under the authority of the Union Shop Statute. Petitioners submit that the meaning of "membership" to respondents can only be discerned by reference to the provisions of the constitutions and by-laws under which they operate.

Respondents, as set forth at page 16 of the petition for certiorari, have not heretofore been so vague about the extent of their demand. In their pleadings in the trial court, both the individual petitioners and Santa Fe sought relief from respondents' demand for a contract making full union membership a condition of employment. Respondents did not deny that that was the nature of their demand and they do not deny it today. Indeed, their Opposition, in its expressions of disagreement with the majority below and in its contentions that this Court in *Hanson* approved the requirements of the Statute for union membership, necessarily confirms that their demand was for a full union shop.

This case was tried on the theory that respondents were seeking to make full union membership a condition of employment. And the findings of the jury and the trial judge, which respondents have not controverted, were directed against such a demand.

Although, at page 8 of their Opposition, respondents charge that petitioners' references to union discipline and

control ignore the limitations of the Union Shop Statute and the contract which they demanded, it is important to note that they very carefully avoid saying that members do not have to subject themselves to union discipline. Of course, they would not go that far. All they say in effect is that if a man should be expelled from a union for refusal to subject himself to its discipline, then the union cannot require the employer to discharge him for lack of union membership. But what respondents have so carefully avoided is that expulsion from membership is by no means the only weapon available to a union to enforce its disciplinary measures. Without being unduly skeptical, it may be doubted whether one of respondents would ever expel a man for refusal to submit to its discipline, for this would deprive it of the right to collect dues and assessments from him. There are, of course, many ways in which a union can enforce its discipline short of expulsion. It starts with a man who has been forced to join involuntarily, a man whose will to resist and maintain his independence has been broken in the first instance. It may subject him to suspension which in these unions as in other organizations subjects a man to various disabilities. It may subject him to fines and penalties even though it cannot secure his discharge for failure or refusal to pay them. It may subject the recalcitrant to a degrading reprimand in front of his co-workers. It may subject him to an infinite variety of coercive pressures, and hold, not only him but his entire family as well, up to the ridicule, scorn and obloquy of the working community. All these can be combined to make a man's life so miserable as to force him to knuckle under or abandon his job and perhaps even leave the community in which he has settled. With these weapons available to the unions, it is folly indeed to say that they do not have the power to disclipline those members who will not obey their laws, rules and regulations.

6. Reply to Respondents' Assertion That Petitioners Argue That Hanson Was Predicated on a Misunderstanding and Should Be Overruled

Respondents charge that petitioners' taxing power argument is frivolous and that petitioners contend that this Court made certain statements in its *Hanson* opinion "out of ignorance."

Neither of these charges is accurate. Under the third question presented, petitioners do raise the point that with regard to dues, fees and assessments, Congress has unlawfully imposed a tax for private purposes and unlawfully delegated to a private party the sovereign power to tax. Respondents refer to this point as frivolous, but make no effort to meet it. To dismiss an argument in that way is no answer. If it is frivolous, it should be quite easy to meet and destroy it. It is strange that a complaint of abuse of the taxing power should be labeled frivolous in a country which fought a revolution and attained its independence in a dispute over deprivations of liberty, among which grievances over taxes figured prominently, such as taxation without representation. Petitioners' complaint against taxation for private purposes is by no means minor by comparison and deserves full consideration by this Court.

Petitioners, of course, do not charge that this Court attributed to Congress an intent to promote the stability of unions and labor relations out of "ignorance." While in *Hanson* this Court did say that: ". . . Congress might well believe that . . . [the union shop] would help insure the right to work in and along the arteries of interstate commerce," the fact remains that it did not have the benefit of evidence in the record here which shows that a union shop is totally unnecessary for union security, labor peace, or stability of labor relations. Congress did not and could not find that the Union Shop Statute would serve those purposes. Respondents attempted to raise the issue of

union security in the trial court, but their efforts resulted in a complete debacle, for their own economic expert testified that the union shop was not "necessary" to the unions (S.F. 1773), and, in response to Special Issue No. 13, the jury found that a union shop is "not necessary" to their "continued existence and well-being." In the Court of Civil Appeals, respondents did not see fit to challenge this latter finding directly. They did attack it indirectly, but the court ruled against them, saying:

> "Counsel for appellants repeatedly refers to the issue in this cause as one involving 'union security.' Only a casual survey of the acts of Congress and of the pertinent decisions of the Supreme Court of the United States on this issue should wholly dispel any fear entertained by appellants as to loss of 'union security'." 277 S.W. 2d at 778.

What this Court said in *Hanson* about what Congress might have had in mind in enacting the Union Shop Statute was, as stated above, based on the record in that case. To say, as respondents do, that this Court would reach the same conclusion in the face of the array of constitutional facts presented in this record is at least presumptuous. Petitioners' economic witness, Dr. Leo Wolman, Professor of Economics at Columbia University, testified to the expansion and success of respondents during the years 1934-1951 when the Railway Labor Act contained a right-to-work law proscribing all forms of compulsory unionism. The record here also affirmatively shows that during those years there was not only no loss of union security but that the absence of a union shop did not adversely affect the stability of labor relations or impair the right to work, and did not result in lack of discipline among workers.

In view of this evidence we may appropriately inquire as to respondents' true objective in seeking the union shop. Their spokesman before Congressional committees, Mr. George M. Harrison, repeatedly declared that the unions sought compulsory membership in order to acquire disciplinary authority and control over all workers, as well as to

force financial contributions from the so-called "free riders." *Hearings before Committee on Interstate and Foreign Commerce on H.R. 7789*, 81st Cong., 2d Sess. 38 (1950); *Hearings before a Subcommittee of the Committee on Labor and Public Welfare on S. 3295*, 81st Cong., 2d Sess. 28 (1950). In short, respondents' objectives in securing enactment of the Union Shop Statute were power and money although they freely conceded that they already had all the power they needed for collective bargaining purposes.[2] Lord Acton said that power tends to corrupt and absolute power tends to corrupt absolutely. These unions may not secure absolute power through the medium of the union shop, but they would admittedly secure more power than they need for collective bargaining purposes. Power in excess of real needs, like absolute power, tends to corrupt, tends to be abused. There is not the slightest reason why such power should be granted, particularly when it is considered that to do so invades the right to work and freedom of association of individual workers.

Respondents would have this Court believe that petitioners present no more than opinions different from those supposedly entertained by Congress. But how can a mere difference of opinion be involved? How can Congress be supposed to have found that respondents needed more power for collective bargaining purposes when their chief

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[2] Speaking on behalf of all respondent unions in advocating the union shop bill in 1950 before the House Committee on Interstate and Foreign Commerce, Mr. George M. Harrison was asked by Congressman Harris whether the union shop would strengthen the unions' bargaining position. He replied:

> "No; I do not think it would affect the power of bargaining one way or the other, Congressman Harris.
>
> • • • • •
>
> "If I get a majority of the employees to vote for my union as the bargaining agent, I have got as much economic power at that stage of development as I will ever have. • • • " *Hearings Before Committee on Interstate and Foreign Commerce on H.R. 7789*, 81st Cong., 2d Sess., 20-21 (1950).

spokesman disclaimed any such need? How can Congress be supposed to have found that compulsory membership was needed for union security when it was silent on the point and when the judicial inquiry into the subject provoked by respondents resulted in complete collapse of their case and impregnable findings against them? Even if respondents should be right in their contention that the individual rights of petitioners—their right to work, their freedom of association, their political freedom, their liberty of conscience—might, under some circumstances, be compelled to yield to the necessities of a well-ordered regulation of interstate commerce, the fact remains that under the evidence in the record of this case there is not the slightest basis for asserting that there is anything that would begin to weigh so heavily in the scales as to outweigh those individual rights and liberties.

CONCLUSION

Respondents urge in their Conclusion that petitioners' contentions are "clearly wrong, if not frivolous, on the merits." The short answer to this is that the Supreme Court of Texas was seriously divided on the questions and the full bench saw fit to stay its mandate and continue the injunction in effect pending this Court's action on petition for certiorari. It did not view petitioners' contentions as lightly as do respondents.

Petitioners respectfully submit that their petition for writ of certiorari should be granted.

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